(9)

No. 87-1165-CFX
Status: GRANTED

Title: California, et al., Petitioners
v.
United States, et al.

Docketed:
January 11, 1988

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Muys,Jerome C.

Counsel for respondent: Solicitor General, McElroy,Scott B., White,Dale T., Strickland,William

Entry	Date	Note	Proceedings and Orders
1	Jan 11 1988	G	Petition for writ of certiorari filed.
2	Feb 8 1988		Order extending time within which to file a consolidated brief by Colorado River Indian Tribes, Fort Mojave Indian Tribe and Quechan Tribe in opposition to the petition for a writ of certiorari to and including March 14, 1988.
4	Feb 11 1988		Order extending time to file response to petition until March 17, 1988.
5	Feb 12 1988		The above extension of time applies to all respondents.
6	Mar 17 1988		Brief of respondents United States, et al. in opposition filed.
7	Mar 17 1988		Brief of respondents Fort Mojave Indian Tribe, et al. in opposition filed.
8	Mar 23 1988		DISTRIBUTED. April 15, 1988
10	Apr 18 1988		REDISTRIBUTED. April 22, 1988
11	Apr 25 1988		Petition GRANTED.
			**********
12	May 18 1988		Record filed.
		*	Certified copy of C. A. proceedinngs, 4 volumes, received.
13	May 25 1988	G	Motion of petitioners to dispense with printing the joint appendix filed.
15	Jun 9 1988		Brief of petitioners California, et al. filed.
16	Jun 9 1988		Record filed.
		*	Certified copy of proceedings, 1 volume, and volumes 2 through 9 of original record, box, received.
14	Jun 13 1988		Motion of petitioners to dispense with printing the joint appendix GRANTED.
17	Jul 5 1988		Order further extending time to file brief of respondent on the merits until August 12, 1988.
18	Aug 12 1988		Brief of respondents Colorado River Indian Tribes, et al. filed.
19	Aug 12 1988		Brief amici curiae of Klamath Tribe, et al. filed.
20	Aug 12 1988		Brief of respondents United States, et al. filed.
22	Aug 13 1988		Order extending time to file brief of respondent on the merits until August 16, 1988.
23	Aug 18 1988		CIRCULATED.
24	Aug 24 1988	G	Motion of the Solicitor General for divided argument filed.
25	Sep 15 1988	X	Reply brief of petitioners California, et al. filed.
27	Sep 30 1988		SET FOR ARGUMENT. Monday, November 28, 1988. (1st case)

No. 87-1165-CFX

Entry	Date	Note	Proceedings and Orders
			(1 hr.)
26	Oct 3 1988		Motion of the Solicitor General for divided argument GRANTED.
28	Nov 28 1988		ARGUED.

87 No. 1165

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF CALIFORNIA, THE STATE OF ARIZONA, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, AND COACHELLA VALLEY WATER DISTRICT,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WARREN J. ABBOTT, *General Counsel*
FRED VENDIG, *Assistant General Counsel*
KAREN L. TACHIKI, *Deputy General Counsel*
JAMES F. ROBERTS, *Deputy General Counsel*
THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
P.O. Box 54153
Los Angeles, California 90054-0153

JEROME C. MUYS
Counsel of Record

THOMAS W. WILCOX
WILL & MUYS, P.C.
1825 Eye Street, N.W., Suite 920
Washington, D.C. 20006
(202) 429-4344

Attorneys for The Metropolitan Water District of Southern California

January 11, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

JUSTIN MCCARTHY
REDWINE & SHERRILL
1950 Market Street
Riverside, California 92501

Attorney for Coachella Valley Water District

JOHN K. VAN DE KAMP, *Attorney General of the State of California*
R. H. CONNETT
N. GREGORY TAYLOR
Assistant Attorneys General
DOUGLAS B. NOBLE,
Deputy Attorney General
3580 Wilshire Boulevard, Suite 600
Los Angeles, California 90010

Attorneys for the State of California

ROBERT K. CORBIN, *Attorney General*
ANTHONY B. CHING, *Solicitor General*
1275 West Washington Street
Phoenix, Arizona 85007

Attorneys for the State of Arizona

QUESTIONS PRESENTED

(1) Whether the conceded waiver of sovereign immunity by the United States in intervening and asserting water rights claims for certain Indian reservations in *Arizona v. California* (1963) 373 U.S. 546 (*Arizona I*) extends to an ancillary action in a District Court to determine the disputed boundaries underlying those same claims as mandated in *Arizona v. California* (1983) 460 U.S. 605 (*Arizona II*).

(2) Whether the Quiet Title Act applies to an action for judicial review of decisions by the Secretary of the Interior redefining and enlarging the boundaries of three Indian reservations where the action (a) seeks a determination of the boundaries solely to measure the implied water rights for the reservations and (b) does not seek to divest the United States of title to any lands.

(3) If the Quiet Title Act is applicable, does its exception for "trust or restricted Indian lands" bar judicial review where the United States has made no showing that the disputed areas are such lands other than to rely on the three disputed *ex parte* Secretarial orders at issue, two of which (Fort Mojave and Colorado River) were based on interpretations rejected by the Special Master in *Arizona I* and the third (Fort Yuma) overturned three prior departmental decisions to the contrary.

(4) Whether the boundary disputes present a "case or controversy".

LIST OF PARTIES

The parties to the proceedings below were:

Petitioners the State of California, the State of Arizona, The Metropolitan Water District of Southern California and Coachella Valley Water District, the latter two petitioners being public agencies of the State of California.

Respondents the United States of America, Donald P. Hodel, Secretary of the Interior, Quechan Indian Tribe, Fort Mojave Indian Tribe and Colorado River Indian Tribes.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-

THE STATE OF CALIFORNIA, THE STATE OF ARIZONA,
THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA,
and COACHELLA VALLEY WATER DISTRICT,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners the State of California, *et al*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the proceedings below on October 14, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported as *Metropolitan Water District of Southern California v. U.S.* at 830 F.2d 139 and is reprinted in the appendix hereto, p. 1a *infra*.

The memorandum decision of the United States District Court for the Southern District of California (Brewster, D.J.) is reported as *Metropolitan Water District of Southern California v. U.S.* at 628 F.Supp. 1018 (1986) and is reprinted in the appendix hereto, p. 12a *infra*.

JURISDICTION

Invoking federal jurisdiction under 5 U.S.C. §702, petitioners The Metropolitan Water District of Southern California (hereafter "Metropolitan") and Coachella Valley Water District (hereafter "Coachella") brought this suit in the Southern District of California against respondents the United States of America and the Secretary of the Interior. The respondent tribes intervened as defendants and the States of California and Arizona were later joined as defendants. On February 25, 1986, the District Court denied respondents' motions for summary judgment, granted petitioners' cross-motion for summary judgment in part, declared the Secretary's 1974 order redetermining the boundary of the Fort Mojave Indian Reservation invalid, and set the boundary issue for trial. Respondents obtained an order granting an interlocutory appeal on the merits of the District Court order. However, on that appeal respondents also raised the claim that the District Court lacked jurisdiction because the United States had not waived its sovereign immunity and petitioners Metropolitan and Coachella lacked standing to bring the action, defenses which had been intentionally waived in the District Court.

On respondents' appeals the Ninth Circuit on October 14, 1987, entered a judgment and an opinion remanding to the Southern District and directing that the complaint be dismissed for lack of jurisdiction. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

(1) 5 U.S.C. §702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. . . . Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(2) Quiet Title Act, 28 U.S.C. §2409a

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under . . . section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall

determine to be just compensation for such possession or control.

(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

* * *

(3) McCarran Amendment, 43 U.S.C. §666

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. . . .

* * *

(4) 43 U.S.C. §772

The Secretary of the Interior may, as of March 3, 1909, in his discretion, cause to be made, as he may deem wise under the rectangular system on that date provided by law, such surveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

STATEMENT OF THE CASE

This case arises out of the historic water rights adjudication by this Court in *Arizona v. California* (1963) 373 U.S. 546 (hereafter *Arizona I*) and its aftermath, *Arizona*

v. California (1983) 460 U.S. 605 (hereafter *Arizona II*). It involves the attempt by petitioners to obtain a determination of several Indian reservation boundary disputes left unresolved in this Court's 1963 decision in *Arizona I* so that the reservations' water rights may be finally established in order to facilitate necessary water planning in California and Arizona. This Court in *Arizona II* directed the States of California and Arizona to intervene in an action brought by Metropolitan and Coachella in the U.S. District Court for the Southern District of California to determine those boundaries. The States were added as parties and have fully participated in the proceedings below. The amount of water at issue is about 104,000 acre-feet of diversions in California, which is enough water to supply about 500,000 people annually in Metropolitan's service area.

Metropolitan imports water to the Southern California coastal plain and wholesales that water to its twenty-seven member public agencies in an area stretching from Ventura to the Mexican border and encompassing over one-half the population of the state. A major portion of Metropolitan's water is obtained from the Colorado River pursuant to contracts with the Secretary of the Interior for the storage and delivery of Colorado River water pursuant to the Boulder Canyon Project Act (43 U.S.C. § 617 *et seq*).

In *Arizona I* California's share of the 7.5 million acre-feet of Colorado River water which was allocated to Arizona, Nevada, and California by the Secretary pursuant to the Boulder Canyon Project Act was limited to 4.4 million acre-feet a year, plus one-half of any surplus. In addition, five Indian reservations along the lower Colorado River were awarded "implied" water rights based upon the *Winters* doctrine, *i.e.*, enough water to satisfy the "reasonable needs" of the reservations. *Winters v. U.S.* (1908) 207 U.S. 564. The "reasonable needs" of the Indians were measured by the amount of "practicably irrigable

acreage" on each reservation multiplied by a unit diversion duty for such acreage. *Arizona I* at 600-01. The reservations' priority dates are their dates of creation or the dates of any subsequent additions. Each reservation was created long before Metropolitan's water contracts with the Secretary.

An issue was raised by California as to whether certain lands for which *Winters* rights were sought by the United States for the Colorado River and Fort Mojave Reservations were actually within their boundaries.[1] The issues were tried before Special Master Simon H. Rifkind, who largely rejected the United States' claims, adopted the California positions, and recommended water allocations for those reservations based upon his boundary determinations.[2] This Court, in otherwise adopting the recommendations of the Special Master with respect to the United States' Indian claims, found it "unnecessary to resolve those [boundary] disputes here." *Id.* at 601.

The Court's 1964 Decree (376 U.S. 340, 345) nevertheless awarded water rights to the two reservations based upon the Special Master's boundary determinations,

[1] No dispute was raised as to the boundary of the Fort Yuma (Quechan) Reservation since the United States' claim was consistent with long-standing Departmental interpretation of that boundary, which is contrary to the later 1978 Secretarial order challenged below.

[2] The decree in *Arizona I* awarded the five mainstream reservations 905,498 acre-feet of diversions for 135,636 acres of irrigable land (376 U.S. 340, 344-45), even though the maximum annual irrigated acreage on those reservations never exceeded 36,000 acres. California Proposed Findings and Conclusions before Special Master Simon H. Rifkind (April 1, 1959) Findings 4C:104, 4D:103, 13D:104, 14C:108, 18E:104 and 18F:104.

Special Master Rifkind recommended "practicably irrigable acreage" as the measure of the reserved water rights because, *inter alia*, it would "provide certainty for both the United States and non-Indian users." Report of Special Master Simon H. Rifkind (December 5, 1960) at 265. That objective has been frustrated by the three unresolved reservation boundary disputes which are the subject of this action.

"... subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." The quantities awarded are charged to the allocation of the state in which the reservation is located. Because of Metropolitan's junior priority, all parties concede that any additional water rights for the reservations in California will necessarily reduce Metropolitan's supply during any year when California's entitlement is restricted to 4.4 million acre-feet. That limitation is no more than several years away now that the Central Arizona Project is on line.

The three Secretarial Orders which are the subject of the litigation below were issued in 1969, 1974 and 1978. There is no dispute that the proper location of the reservation boundaries is the essential first step in establishing the measure of any implied water rights to which these reservations may be entitled under *Arizona I*. It is also not disputed that the Secretary's Fort Mojave and Colorado River reservation boundary orders were based on the same interpretations which California had successfully resisted in the trial before Special Master Rifkind. Nevertheless, each of the orders was entered without affording Metropolitan or any other affected water users notice or opportunity to be heard and purports to redetermine the boundaries *retroactive* to the date of their creation. The undisputed result is to give each reservation additional acres upon which to base a claim for additional water rights with an earlier priority than Metropolitan's.

The culmination of the Secretary's *ex parte* boundary determinations was the United States' petition filed in December 1978 to reopen *Arizona I* and, *inter alia*, allocate additional water rights to the three reservations for the practicably irrigable acreage within the added areas. The Special Master appointed to hear those claims refused to consider the merits of the Secretary's *ex parte* orders, accepting the United States' argument that they constituted "final determinations" of the boundaries. *Arizona II*

at 634-35. Over the objections of Metropolitan and the other "State Parties" he conducted a trial solely on the issue of the irrigability of the added lands and recommended an award to the three tribes of an additional 104,000 acre-feet annually. Faced with the denial of their day in court, Metropolitan and Coachella sought review of the Secretarial boundary orders in the United States District Court for the Southern District of California. The State Parties' subsequent opposition to Special Master Tuttle's report in *Arizona II* made clear the limited purpose of that suit and that it in no way sought to "quiet title" to the lands involved in the water agencies or to otherwise divest the United States of title. For example, in oral argument Justice O'Connor posed the following question to counsel for Metropolitan:

> QUESTION: The states don't claim any interest in the land itself. You are concerned only with the water rights attached to it which might change because of the boundary change. Is that right?
> MR. BORONKAY: That is correct. . . .

Transcript of Oral Argument, *Arizona II* (December 8, 1982) at 14-15 (hereafter "Oral Argument").

It was against that background that the Court, after describing the State Parties' efforts to obtain a resolution of the boundary disputes as being "only for the limited purpose of establishing additional Indian water rights, if any" (*Arizona II* at 634), rejected Special Master Tuttle's recommendations and directed the District Court to resolve the boundary disputes:

> . . . we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute 'final determinations' that could adversely affect the States, their agencies or private water users holding priority rights.

* * *

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and are not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.

Arizona II at 636, 638 (footnotes omitted).

Moreover, the Court's reference to the defenses raised by the United States to the District Court action, including sovereign immunity, was made after the Deputy Solicitor General had "disowned" those defenses in oral argument.[3]

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[3] QUESTION: Well, Mr. Claiborne, what is your—the United States' position in these other forums? Are you taking the position that the Secretary's proceedings are open to review, or are you moving to dismiss for want of jurisdiction, or on sovereign immunity grounds?
MR. CLAIBORNE: Justice White, as was correctly stated, I think, by Mr. Boronkay, the United States has in the proceeding filed in the Southern District of California submitted a motion to dismiss alleging—

QUESTION: So you are saying—your position is that these determinations are not subject to review anywhere, here or in another forum.
MR. CLAIBORNE: I hope I do not have to—I disown the motion to

The United States subsequently amended its motion to dismiss in the District Court action to delete them, with the following explanation:

> Upon consideration of the issues involved, the defendants believe it appropriate to withdraw most of the objections raised in their earlier motion to dismiss. *Where the action merely questions the accuracy of the determination of reservation boundaries, and the legal title to the lands is not at issue, we think the action may go forward pursuant to the Administrative Procedure Act.*

U.S. Memorandum in Support of Motion to File Amended Motion to Dismiss at 3 (June 17, 1983) (emphasis added).

After the parties agreed to address the boundary disputes individually, cross motions for summary judgment on the Fort Mojave dispute were filed. Following extensive briefing and three days of oral argument the District Court voided the Secretary's Fort Mojave order on the basis that (1) the Secretary could not exercise his authority to correct allegedly erroneous surveys under 43 U.S.C. § 772 in a manner that would impair Metropolitan's water rights because Metropolitan was a "claimant" protected by the proviso to that statute and (2) in any event, Metropolitan's water supply contracts entitled it to procedural due-process protection, which it had been denied. The District Court also held that a *de novo* trial as to the proper boundary was appropriate under *Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S. 402 because (1) the Secretary's 1974 order constituted a partial "adjudication" of Metropolitan's water rights and (2) the Secretary's fact-finding procedures were grossly inadequate because Metropolitan had not been given any notice of the Secretary's *ex parte* procedure nor any opportunity to be heard.

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dismiss which has been filed by the United States in the district court . . . Oral Argument at 61-62.

Upon respondents' motions and District Court certification, the Court of Appeals granted an interlocutory appeal under 28 U.S.C. § 1292(b). At this point respondents decided that they did not want the District Court to decide the merits of the boundary issues and resurrected the sovereign immunity and standing defenses earlier abandoned.[4] The Court of Appeals accepted the sovereign immunity argument and ordered the District Court to dismiss the case for lack of jurisdiction. It also suggested that Metropolitan's action "presents the additional jurisdictional problem of absence of a case or controversy."[5] It did not address the merits of the District Court's decision.

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[4] *See p. 10 supra*. The Tribes had earlier asserted that: "Following the Supreme Court's 1983 decision in *Arizona v. California*, the conclusion that MWD's interests merit judicial review of the Secretary's decisions is not subject to question. . . . [and] the parties intend this litigation to constitute the necessary review." Memorandum of the Fort Mojave Indian Tribe, The Quechan Tribe and the Colorado Indian Tribes in Support of Their Motion to Certify Issues for Interlocutory Appeal at 20-21, notes 7 and 8 (March 25, 1986).

[5] App. at 6a. After a highly questionable analysis of why the action may have presented a justiciable controversy before, but not after this Court's decision in *Arizona II*, the court found it unnecessary to decide the question. However, the tenor of its discussion makes it clear that it has reached a conclusion on this issue. Consequently, if this petition is granted this Court should also decide that issue. Otherwise, if the Ninth Circuit's sovereign immunity decision is overturned it is clear to petitioners that the Ninth Circuit will simply dismiss for lack of a case or controversy. Therefore a decision by this Court on that issue is necessary to prevent even further delay of the resolution of the boundary controversies, especially since the Secretary is already delivering substantial quantities of water to the Fort Mojave Tribe for use on the disputed area in violation of the decree in *Arizona I*.

After having conceded in the District Court that Metropolitan is "a party aggrieved by the Secretary's action and that they have standing under the APA" (Tr. of proceedings of December 10, 1984 at 104) the United States argued on appeal that Metropolitan was not an "aggrieved" party inasmuch as the Secretary's 1974 order "has caused no actual or threatened injury to Metropolitan." U.S. Br. at 32. Although it is true that the Secretary's boundary decisions *per se* have not yet

The Ninth Circuit's decision was based on several crucial premises, all faulty: (1) the waiver of sovereign immunity by the United States in asserting water rights claims for the three reservations in *Arizona v. California* does not extend to the litigation of the boundary components of those same claims in the ancillary proceeding before the District Court; (2) the waiver of sovereign immunity in the Administrative Procedure Act (5 U.S.C. §702) is not applicable because the Quiet Title Act (QTA) is a "statute that grants consent to suit [and] expressly or impliedly forbids the relief which is sought" because it bars actions to quiet title to "trust or restricted Indian lands" and "the effect of a successful challenge [by petitioners] would be to quiet title in others than the Tribe" (App. at 9a);[6]

caused an actual reduction in Metropolitan's supply under its water delivery contracts, that result is inevitable if these decisions are sustained. Thus they certainly present the kind of "threatened injury" which is adequate to sustain jurisdiction under this Court's recent standing decisions abandoning any rigid requirement of "certainty" of injury to a more liberal "probability" of injury. Davis, 4 *Admin. Law Treatise* (1983) §24.12; *Bryant v. Yellen* (1980) 447 U.S. 352. Similarly, the Secretarial orders are "ripe" for review even though they have not yet been applied to actually reduce Metropolitan's Colorado River water rights. *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136; Davis, 4 *Admin. Law Treatise* (1983) §§ 25.6-25.10. In any event, petitioners believe that this Court's directive in *Arizona II* that the District Court hear the boundary disputes is dispositive of this issue.

[6] The court did not address the Tribes' contention that Metropolitan's suit was barred by the QTA's 12 year statute of limitations because Metropolitan knew of the United States' boundary claims since the original litigation of those disputes in the 1950's in *Arizona I*. This would put petitioners in the position of having prevailed in *Arizona I* with regard to the Fort Mojave and Colorado River Reservation boundary issues, but yet being required to commence a separate action to relitigate the same issues, a procedure totally at odds with this Court's conclusion in *Arizona II* that the United States had that burden. *Arizona II* at 637.

Even if the QTA were applicable to Metropolitan's action, its limitation period should be tolled while the issue was in contention before this Court in the sequential stages of *Arizona v. California* resulting

and (3) the action is not basically a water rights suit and, in any event, the QTA's preservation of the McCarran Amendment's waiver of sovereign immunity for water rights adjudications involving the United States is not applicable because petitioners do not seek a "general stream adjudication".

REASONS FOR GRANTING THE WRIT

In *Arizona II* this Court made it clear that it did not look with favor on the United States' failure to obtain a judicial determination in another forum of the Fort Mojave and Colorado River reservation boundary issues which it had presented in *Arizona I* but which were not decided in 1963. Moreover, the Court's discussion of its conclusion that the District Court appeared to be a "suitable and appropriate" forum to resolve the three boundary disputes made it clear that it did not favorably view the jurisdictional defenses which had been raised by the United States in the District Court. Nevertheless, after having formally abandoned those defenses before the District Court, the United States successfully resurrected its sovereign immunity and standing defenses on its interlocutory appeal from the District Court's order invalidating the Secretary's 1974 Fort Mojave boundary order. The Ninth Circuit's decision:

(1) frustrates the long overdue resolution of the only remaining unadjudicated water rights on the lower Colorado River in a timely fashion and leaves necessary water planning in California and Arizona in limbo;

(2) raises important questions about the scope of the United States' waiver of sovereign immunity when it asserts claims by direct action or intervention, particularly in the original jurisdiction of this Court;

in the decision in *Arizona II*. See *Burnett v. New York Central R.R.* (1965) 380 U.S. 424. For the reasons detailed in note 5 *supra*, this issue should also be decided if this petition is granted.

(3) negates the salutary broad waiver of sovereign immunity in the Administrative Procedure Act by a tortured reading of the scope of the Quiet Title Act which is in conflict with the QTA's plain language and this Court's interpretation of its purpose;

(4) applies the "trust or restricted Indian lands" exemption in the QTA in a fashion in conflict with the Eighth Circuit's interpretation; and

(5) presents an important question concerning the relationship of the QTA to Indian water rights adjudications and the Secretary's authority to resurvey public and Indian lands.

Petitioners seek review and summary reversal of the Ninth Circuit's decision by this Court. If the Ninth Circuit's decision is let stand, petitioners will have no avenue for relief other than to petition this Court to reopen the decree in *Arizona v. California* and decide the disputes. *See Arizona II* at 638.

I. The Ninth Circuit's decision unreasonably limits the conceded waiver of sovereign immunity resulting from the United States' assertion of Indian water rights in *Arizona I* and restricts this Court's ability to utilize district courts to decide issues presented by the United States in original actions.

(a) The United States has waived sovereign immunity as to the reservation boundary disputes.

There is no dispute that the United States' intervention in *Arizona I* and its assertion of *Winters* rights for the Fort Mojave and other Indian reservations waived its sovereign immunity to the extent necessary to adjudicate those claims.[7] Petitioners contend that such waiver extends to

[7] *Arizona I* at 551. Justice White put the issue succinctly to counsel for the United States during oral argument in *Arizona II*:
QUESTION: But the United States is in this Court litigating . . . so it is subject to . . . having its case decided here. You can't get out of this case with a sovereign immunity claim.
MR. CLAIBORNE: I appreciate that . . . .
Oral Argument at 62.

ancillary proceedings, such as the District Court litigation below, in which essential elements of those same federal claims are presented. The issue appears to be one of first impression. However, this Court long ago held, in a classic opinion by Justice Holmes, that "when the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done *with regard to the subject matter*." *Luckenbach S.S. Co., Inc. v. The Thekla* (1924) 266 U.S. 328, 339-40 (emphasis added). The Fifth and Tenth Circuits have held that neither independent actions nor claims in intervention against the United States with respect to the same subject matter in the same district court are barred by sovereign immunity.[8] Although petitioners have found no case squarely holding that the waiver of sovereign immunity which results from the United States' assertion of a claim in one forum extends to a separate suit in another forum on the same subject matter seeking resolution of an issue necessarily presented by the United States' claim, petitioners believe that such a result may reasonably be implied from *The Thekla*, *supra*, and *Minnesota v. U.S.* (1939) 305 U.S. 382, 389 (district court jurisdiction on removal derives from state court jurisdiction). Just as this Court made clear in rejecting Arizona's contention that its sovereign immunity barred intervention by the Tribes in *Arizona II*[9], the United States' sovereign immunity is not

[8] *Jones v. Watts* (5th Cir. 1944) 142 F.2d 575; *U.S. v. Martin* (10th Cir. 1959) 267 F.2d 764, 769-70 (water rights claims); *U.S. v. Taunah* (10th Cir. 1984) 730 F.2d 1360 (Indian land dispute).

[9] The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by

compromised by requiring it to litigate in the District Court the identical claims it presented and litigated (unsuccessfully) before this Court in *Arizona I*, but which the Court left open for future resolution elsewhere. Petitioners seek no affirmative relief of any kind against the United States, *e.g.*, damages for delivering water to the disputed areas in violation of the decree in *Arizona I*. Like a permissible counterclaim, the issue which petitioners seek to have resolved "arises out of the same transaction or occurrence as the main suit and the relief sought neither exceeds nor is different in kind from that demanded by the Sovereign". *U.S. v. Penn* (D. V.I. 1986) 632 F.Supp. 691, 693. Consequently, as Justice Holmes concluded in *The Thekla*, "the reasons are strong for not obstructing the application of natural justice against the Government by technical formulations when justice can be done without endangering any public interest . . . [The Government] joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act." 266 U.S. at 341.

The Ninth Circuit did not reject petitioners' claim that the waiver of sovereign immunity resulting from the United States' intervention in *Arizona I* extends to the subject matter of its claims without limitation as to forum.[10] Rather, the Ninth Circuit concluded that "an application to the Supreme Court under a continuing decree for a

granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

Arizona II at 614.

[10] The United States argued that the earlier Ninth Circuit decision in *Fidelity & Casualty Co. v. Reserve Ins. Co.* (9th Cir. 1979) 596 F.2d 914 was adverse to petitioners' argument. That case is clearly distinguishable, however, because petitioners, unlike the plaintiff insurance company in *Fidelity*, did participate in *Arizona I and II* and this Court concluded in *Arizona II* that the District Court suit was necessary to

reallocation of water rights cannot be viewed, under any stretch of the imagination, as consent to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation boundaries". App. at 8a. That analysis is plainly in error and evidences a lack of understanding of the critical relevance of a Secretarial boundary determination to the magnitude of a *Winters* water right. The United States told this Court in *Arizona I* that "the determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation" and, as this Court later noted, "all of the parties treated the boundary matters as fully adjudicable issues of material fact or law." *Arizona II* at 637.

The United States should not be permitted to abuse the original jurisdiction of this Court by asserting water rights for Indian reservations and then, having had its underlying boundary claims rejected, running for cover after it became clear that the District Court was not sympathetic to the Secretary's inequitable boundary determination procedures. The United States' blatant forum-shopping strategy should be rejected.

(b) The Ninth Circuit's decision frustrates this Court's directive in *Arizona II* that the boundary disputes be resolved by the District Court.

Petitioners believe that this Court's directions to the District Court in *Arizona II* clearly made those proceedings "ancillary" to the original proceedings in this Court, even if those directions may have fallen short of actually designating Judge Brewster a special master for the limited purpose of determining the boundaries (a course of action that petitioners believe remains open to the Court):

provide a resolution of the boundary claims presented by the United States in those original actions. In any event, *Fidelity* was not relied on by the Ninth Circuit.

> Hence, in our judgment, the litigation filed in the United States District Court for the Southern District of California should go forward, intervention motions, if any are to be made, should be promptly made, and the litigation expeditiously adjudicated. If there are issues in that action without substantial connection to the issues in this original action, they should be severed and adjudicated separately if their consideration would substantially delay the final resolution of the questions which have made it necessary to keep our decree in this action open to accommodate the results of unresolved issues.

Arizona II at 639 (emphasis added).

That directive followed rejection of the arguments of the States of Arizona and California that this Court should decide the boundary issues. Acknowledging that "the States have not yet sought to intervene in that litigation" (*id.* at 638), the Court directed that "intervention motions . . . should be promptly made" and "[i]f the States and/or the agencies wish to challenge the recently finalized administrative action regarding the 'Checkerboard area' . . . , they should amend their complaint and raise the issue in the District Court suit." *Id.* at 639. The Court was clearly shifting the arena for the necessary resolution of the boundary disputes from a traditional Court-appointed Special Master to the District Court. By that action petitioners believe that the Court did not intend to nullify the waiver of sovereign immunity with respect to those same claims which resulted when the United States initially presented them in *Arizona I*. Apart from the importance of this issue in the present Colorado River dispute, the Court may find it highly useful to utilize district courts to conduct proceedings ancillary to cases in its original jurisdiction and should take this opportunity to clarify the scope of its authority in this regard.

II. The Ninth Circuit's interpretation of the Quiet Title Act extends its applicability far beyond its plain language and conflicts with this Court's decisions as to its scope.

The QTA waives sovereign immunity for actions "to adjudicate a disputed title to real property in which the United States claims an interest . . . ." 28 U.S.C. §2409a(a). The plain language of the Act, reinforced by its legislative history, makes it clear that Congress intended the QTA to apply only to suits seeking to divest the United States of some or all of its interests in land.[11] Indeed, this Court in *Block v. North Dakota* (1983) 461 U.S. 273, 282, recognized that the Congressional hearings on the proposed legislation reflected the "predominant view . . . that citizens asserting title to or the right to possession of lands claimed by the United States were 'without benefit of a recourse to the courts', because of the doctrine of sovereign immunity" and that "Congress sought to rectify *this state of affairs*" in the QTA. (Emphasis added). Thus section 3(c) required that a party bringing a suit under the Act must "set forth with particularity the nature of the right, title or interest which [it] claims in the real property". 28 U.S.C. §2409a(c). Inasmuch as it is undisputed that petitioners have alleged no such claim to the lands in the disputed area, the QTA is plainly not applicable to this action. *See, e.g., Prater v. U.S.* (5th Cir. 1980)

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[11] That the "quiet title" claim which must be specifically alleged is one which would divest the United States of title is made abundantly clear by section 3(b), which provides that, in the event the adverse private claim is sustained, the United States may elect to retain the land and pay just compensation to the claimant. 28 U.S.C. §2409a(b). The hearings on the proposed legislation focused solely on the need to afford private land claimants access to the courts in order to "quiet title" to areas in which *ownership* was in dispute with the United States. *Hearings on S. 216 et al before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs*, 92d Cong., 1st Sess. *passim* (1971).

618 F.2d 263; *Kinscherff v. U.S.* (10th Cir. 1978) 586 F.2d 159; *City of Sault Ste. Marie, Michigan v. Andrus* (D.D.C. 1978) 458 F.Supp. 465. In *Landow v. Carmen* (D. Md. 1983) 555 F.Supp. 195, 197, the court observed that "although there are many reported cases on the Quiet Title Act, this Court is not aware of any case holding that a dispute about a non-ownership interest is sufficient to confer Quiet Title Act jurisdiction." Petitioners' research confirms that analysis.

In its brief on the merits before this Court in *Block*, the United States characterized North Dakota's suit as one "to wrest title" from the Federal Government (U.S. Br. at 11) and asserted that the QTA "established a uniform procedure for prosecuting claims to land to which the United States asserts title." *Id.* at 12. With regard to the applicability of 5 U.S.C. §702, the United States explained as follows:

> Of course, Section 702 allows challenges to the administration of federal lands on the ground that the actions complained of violate procedural or substantive restrictions imposed by applicable law. But the amendment to the APA was never conceived of as affording a vehicle for questioning the underlying title.

Id. at 23. Petitioners agree, and it is plain that the present boundary disputes fall into the former category, not the latter.

Consequently, it follows that the QTA's provision that it "does not apply to trust or restricted Indian lands" is similarly limited to claims that would divest the *United States* of title to such lands, since it is the fee owner of such lands. *Minnesota v. U.S.* (1939) 305 U.S. 382. These were the kinds of claims to Indian lands made in *U.S. v. Mottaz* (1986) 476 U.S. 834; *Spaeth v. U.S. Secretary of the Interior* (8th Cir. 1985) 757 F.2d 937; and *Florida Dep't of Business Regulations v. U.S. Dep't of Interior*

(11th Cir. 1985) 768 F.2d 1248, *cert. denied* (1986) 475 U.S. 1011. Although in the *Florida* case the State was not seeking to quiet title in itself, the Eleventh Circuit nevertheless found the QTA applicable because Florida sought an order invalidating the challenged transaction and "*divesting the United States of its title to land* held for the benefit of an Indian tribe". 768 F.2d at 1254 (emphasis added).

Petitioners argued below that the Indian lands exemption was not applicable because their claim would not divest the United States of title. In response, the Ninth Circuit broke new ground and concluded that the QTA applies where "the effect of a successful challenge [by petitioners] would be to quiet title in others than the Tribe". App. at 9a. The "others" can only be the United States, because there are no other claimants to the disputed area. That kind of result clearly is not barred by the QTA, since it simply affects the Secretary of the Interior's intramural management of the federal lands—it does not divest the United States of the legal title to the disputed area. As was cogently recognized in a similar boundary dispute in *Pueblo of Taos v. Andrus* (D.D.C. 1979) 475 F.Supp. 359, 365: "The relief requested in this case affects no ownership interest; it would merely adjust the boundaries between two parcels of government-owned land, one of which is held for the benefit of the Taos Pueblo."

The 10th Circuit has also correctly recognized that "adjudicating reservation boundaries is conceptually quite distinct from adjudicating title to the same lands." *Navajo Tribe of Indians v. New Mexico* (10th Cir. 1987) 809 F.2d 1455, 1475. Indeed, this Court recognized in *Arizona II* that such a boundary dispute might involve either "land titles or political jurisdiction". *Arizona II* at 629. However, the Ninth Circuit's failure to recognize the distinction will frustrate resolution of important federal-state-Indian jurisdictional problems which flow from Secretarial orders affecting Indian reservation boundaries. Whether states have

civil jurisdiction over various activities on Indian reservations may often turn on the proper location of a reservation's boundary,[12] just as federal-state criminal jurisdiction turns on whether an area where a crime is committed is "Indian country" under 18 U.S.C. §1151. The boundary issues raised in the numerous "reservation disestablishment" cases, although not affecting land titles, are clearly "boundary disputes with the Government." Yet they are customarily presented and decided in habeas corpus proceedings, which no one has ever suggested are barred by the QTA. *See, e.g., Solem v. Bartlett* (1984) 465 U.S. 463. However, under the Ninth Circuit's assumption that "all boundary disputes with the government" are governed by the QTA[13] without regard to whether resolution of the boundary dispute would divest the United States of title, States would have no recourse to the courts under either the QTA or the APA to resolve critical jurisdictional disputes turning on Secretarial Indian boundary determinations. Congress obviously intended no such result in either act, and this Court should make that clear.

Beyond that error, the Court of Appeals further misconstrues the nature of the action below in asserting that "to allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them." App. at 10a. This is not so. Petitioners would not and probably could not challenge the policy decision of the Secretary to add the disputed public lands to the reservation as Indian trust lands (assuming that he possesses statutory authority to do so) or the obvious power of Congress to declare them trust lands. All that they challenge is the Secretary's attempt to give the added lands a *ret-*

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[12] *See, generally,* Cohen, *Handbook of Federal Indian Law* (1982) ch. 6, sec. C; *Ute Indian Tribe v. Utah* (10th Cir. 1985) 773 F.2d 1087, *cert. denied* (1986) ___ U.S. ___, 107 S.Ct. 596.

[13] *Fadem v. U.S.* (9th Cir. 1986) 791 F.2d 1381, 1383.

roactive earlier *water* priority by "reinterpreting" the controlling 1870 executive order rather than having Congress simply add the lands to the reservation, in which event they would have a water priority junior to Metropolitan's. *See Arizona II* at 641 (Cocopah Reservation).

Finally, the Ninth Circuit erroneously asserts that petitioners challenge "the fundamental authority of the Secretary to establish reservation boundaries and to protect the property interests of Indian tribes. This it cannot do." App. at 10a. Petitioners made no such challenges. First, the Secretary presently has no authority to "establish reservation boundaries." Only Congress can do that. What the Secretary does possess is the authority to interpret statutes and executive orders creating Indian reservations in order to segregate them from the public lands by survey. That conceded authority is not challenged, only the way that it was unlawfully implemented in the case of the Fort Mojave Reservation for the reasons explicated by the District Court. Again, the court in *Pueblo of Taos* applied the proper analysis: "The gravamen of this section, however, is not a challenge to the authority of the Attorney General to issue the opinion he did, but rather is a request seeking this Court's judicial interpretation of the same matter presented to the Attorney General". 475 F.Supp. at 364 (footnote omitted).

Second, petitioners do not challenge the basic authority of the Secretary "to protect the property interests of Indian tribes", but only his improper exercise of that authority in a manner that would unlawfully impair property rights under existing water delivery contracts. In either case, the objective of petitioners' challenge is by no stretch of the imagination to divest the United States of any of its ownership interests in the disputed area, whether public lands or lands held in trust for Indians, and it is only for such a title-divesting claim that the QTA is the exclusive remedy.

In summary, given the nature and background of petitioners' boundary claims and considering that *Block* followed closely on the heels of *Arizona II*, this Court plainly understood that the claims were not of the "title divesting" character encompassed by the QTA, or else the Court's direction that they be pursued in the District Court would have mandated an exercise in futility. This seems unlikely in light of the Court's urging of expeditious resolution of the boundary issues by the District Court, a goal that the Ninth Circuit seems to have gone out of its way to frustrate.

III. The Ninth Circuit's interpretation of the "trust or restricted Indian lands" exception in the Quiet Title Act conflicts with the Eighth Circuit's interpretation and would obliterate the protection afforded property claimants under 43 U.S.C. §772.

Even assuming that the Ninth Circuit's conclusion that the QTA covers suits to "divest" tribes of their claimed beneficial interest in "trust or restricted Indian lands" was correct, whether or not the disputed lands qualify as such lands must still be determined. The Ninth Circuit concludes that the United States' mere pleading that the Secretary has determined such status is enough, thus in effect validating the very Secretarial order under attack. The United States was unsuccessful in a similar ploy to avoid the QTA sovereign immunity waiver before the Eighth Circuit, which held that the United States' bare *ipse dixit* before the district court that certain lands are "trust or restricted Indian lands" is not sufficient to invoke that exception to the QTA. Rather, it required that the United States must "prove that there is a 'substantial' possibility that the lands in question are 'trust or restricted Indian lands' " and remanded for a determination of that issue *on the merits*:

> Because the district court did not address this issue, we reverse and remand for resolution of this issue *on the merits*. On the record before us, and without the benefit of findings or briefing on these issues, we can only determine that there may or may not be a substantial possibility that the Spaeth's lands are trust or restricted lands.

Spaeth v. U.S. Secretary of the Interior (8th Cir. 1985) 757 F.2d 937, 943 (emphasis added); *accord, U.S. v. Phillips* (D. Neb. 1973) 362 F.Supp. 462. This is essentially the same approach that this Court permitted for years before 1976 to determine whether an action against a federal official was barred by sovereign immunity before the 1976 amendment to the APA. *See e.g., Malone v. Bowdoin* (1962) 369 U.S. 643, 647-48; Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action; Some Conclusions from the Public Lands Cases* (1970) 68 Mich. L. Rev. 867 (analyzing this Court's historic reluctance to recognize the sovereign immunity defense in public lands cases); *cf. Borax Consolidated, Ltd. v. City of Los Angeles* (1935) 296 U.S. 10, *reh'g denied* 296 U.S. 664 (review of public land survey); *Ritter v. Morton* (9th Cir. 1975) 513 F.2d 942, 946, *cert. denied* (1975) 423 U.S. 947 (recognizing that "in title dispute cases the issue of sovereign immunity and the ultimate merits of a plaintiff's claim are intimately interconnected"). Petitioners believe it essential that this Court require such an approach in order to prevent the United States from creating a massive loophole in the QTA by unilateral, *ex parte* boundary or other determinations purporting to redesignate public lands as Indian trust lands.[14]

In the absence of a procedure like that employed by the Eighth Circuit, the potential for mischief, particularly in the West, is enormous. The United States owns 755 million

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[14] Although the District Court did not address the merits of the Secretary's Fort Mojave boundary order in the present case, it did find it invalid as in excess of his statutory authority under 43 U.S.C. §772 and because of constitutional due process infirmities, thus meeting both *Malone* criteria.

acres of land, concentrated predominantly in the eleven Western States and Alaska where its lands comprise from 29 to 95 percent of all land in those states.[15] Interspersed throughout those extensive federal landholdings (as well as state and privately owned lands based on public land patents) are some 44 million acres of Indian trust lands, most of which are located in formal reservations.[16] The original public land surveys were notoriously "rough", and the Secretary has long been authorized to conduct resurveys to properly delimit the public lands. *See, e.g.*, Act of March 3, 1909, 43 U.S.C. §772. If such resurveys result in lands formerly thought to be public lands being reclassified as Indian lands, property owners whose rights accrued on the basis of the original survey will be unable to challenge that redetermination, thus emasculating the careful protection afforded "bona fide claimants" under the proviso to the Secretary's resurvey authority under 43 U.S.C. §772. This outrageous result necessarily flows from the Ninth Circuit's earlier decision that the exclusive method for such claimants to enforce the rights guaranteed by that proviso is under the QTA,[17] coupled with its present decision that no affirmative relief at all is available under the QTA if the United States simply alleges that the reclassified lands are "Indian trust lands." It defies common sense to believe that Congress intended such a result from enactment of a statute designed to *remove* the bar of sovereign immunity from title disputes with the United States. Properly construed, as the Eighth Circuit has done, the QTA does not produce that bizarre result.

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[15] See *One Third of the Nation's Land*, The Report of the Public Land Law Review Commission, Ch. 1 (1970).

[16] U.S. Dep't of the Interior, Bureau of Indian Affairs, *Annual Report of Indian Lands* (September 30, 1984) at 2-3.

[17] *See supra* note 13 and accompanying text. Such property claimants traditionally were able to assert their rights in a direct action against the Secretary. *See, e.g., Cragin v. Powell* (1888) 128 U.S. 691.

IV. The Ninth Circuit's decision frustrates the Congressional purpose embodied in the McCarran Amendment and 5 U.S.C. § 702 to permit orderly Indian water rights adjudications in the Western States.

In enacting the QTA Congress preserved existing law waiving sovereign immunity in the highly controversial field of western water rights adjudication. Thus section 1(a) (28 U.S.C. §2409a(a)) provides that the Act applies only to title disputes over "real property in which the United States claims an interest, other than a security interest or water rights" and that it does not "apply to or affect actions which may be or could have been brought under . . . section 208 of the Act of July 10, 1952 (43 U.S.C. 666)", the 1952 waiver of sovereign immunity with respect to water rights adjudications involving the United States (the McCarran Amendment) which this Court has held encompasses suits involving Indian water rights. *Colorado River Water Conservation District v. U.S.* (1976) 424 U.S. 800; *Arizona v. San Carlos Apache Tribe* (1983) 463 U.S. 545. The quoted language was proposed in a draft bill authored by the Justice Department, which explained that it "does not apply to civil actions . . . involving or relating to water rights." H.R. Rep. No. 1559, 92d Cong. 2d Sess. 10 (1972). The District Court suit below is clearly such an action inasmuch as the determination of an Indian reservation boundary is the essential first step in the adjudication of the "practicably irrigable acreage" within an Indian reservation which is entitled to a *Winters* right. In essence it seeks *partial* adjudication of the water rights of the three reservations—the boundary portions—and is plainly ancillary to the already completed comprehensive adjudication of all water rights along the Lower Colorado River decreed in *Arizona I*, which the Court of Appeals properly noted may satisfy the McCarran Act streamwide adjudication standard. App. at 11a.

The Ninth Circuit decision, if allowed to stand, will produce a highly deleterious impact on the already contro-

versial area of Indian water rights adjudications in the West. At the time of enactment of the QTA, a water right claimant desiring to contest a *Winters* right claim for an Indian reservation could either wait to participate in a streamwide adjudication (if one were initiated) or else bring an officer's suit to attempt to circumvent the sovereign immunity defense. In the general adjudication proceeding the United States would have to establish all of the elements of its *Winters* claim. If its irrigable acreage claim was challenged because of a boundary dispute, the boundary would be tried and adjudicated. If a general stream adjudication was not underway, the water rights claimant could attempt to litigate the validity of the disputed boundary in accordance with the criteria set forth in *Malone v. Bowdoin* (1962) 369 U.S. 643. The amendment of the APA in 1976 waiving the doctrine of sovereign immunity in review of agency actions was intended to eliminate the need for the officer's suit fiction. Indeed the Ninth Circuit has already held that the APA waiver permits suits against federal officials with respect to actions affecting water rights because the McCarran Amendment is not the exclusive remedy for water claims, as the QTA is for quiet title actions. *South Delta Water Agency v. U.S.* (9th Cir. 1985) 767 F.2d 531; *accord, Joint Board of Control of the Flathead, Mission and Jocko Irrigation Dists v. U.S.*; (9th Cir. 1987) 832 F.2d 1127. Despite these holdings, the Ninth Circuit decision below holds, inconsistently, that a suit challenging Indian boundary determinations *solely* to determine water rights and not to divest the United States of title to land is barred. Consequently, the Secretary is free to make *ex parte* boundary determinations and divert water for any added acreage with impunity until a streamwide adjudication is initiated and completed.

Thus, under the Ninth Circuit's decision, the ironic result of (1) Congress' commendable attempt in the QTA of 1972 to preserve existing law waiving sovereign immunity in water rights disputes and (2) Congress' broad waiver

of the sovereign immunity defense in the 1976 APA amendments has been to *narrow* water claimants' access to the courts where the magnitude of an implied *Winters* right turns on a disputed reservation boundary. The absurdity of this retrogressive result demonstrates the basic fallacy of the Ninth Circuit's decision, and this Court should remedy the confusion and inequity which the decision will cause in Indian water rights adjudications in the West.

CONCLUSION

In order to permit the long overdue resolution of the three Indian water rights claims injected by the United States in *Arizona I* almost 35 years ago so that public agencies in California and Arizona may carry out essential water supply planning on the lower Colorado River, petitioners respectfully request that their petition for a writ of certiorari be granted and the Ninth Circuit's decision be summarily reversed.

Respectfully submitted,

WARREN J. ABBOTT, *General Counsel*
FRED VENDIG, *Assistant General Counsel*
KAREN L. TACHIKI, *Deputy General Counsel*
JAMES F. ROBERTS, *Deputy General Counsel*
The Metropolitan Water District of Southern California
P.O. Box 54153
Los Angeles, California 90054-0153

JEROME C. MUYS
Counsel of Record
THOMAS W. WILCOX
WILL & MUYS, P.C.
1825 Eye Street, N.W., Suite 920
Washington, D.C. 20006
(202) 429-4344

Attorneys for The Metropolitan Water District of Southern California

JUSTIN MCCARTHY
REDWINE & SHERRILL
1950 Market Street
Riverside, California 92501

Attorney for Coachella Valley Water District

JOHN K. VAN DE KAMP, *Attorney General of the State of California*
R. H. CONNETT
N. GREGORY TAYLOR
Assistant Attorneys General
DOUGLAS B. NOBLE,
Deputy Attorney General
3580 Wilshire Boulevard, Suite 600
Los Angeles, California 90010

Attorneys for the State of California

ROBERT K. CORBIN, *Attorney General*
ANTHONY B. CHING, *Solicitor General*
1275 West Washington Street
Phoenix, Arizona 85007

Attorneys for the State of Arizona

January 11, 1988

APPENDIX

APPENDIX A

United States Court of Appeals,
Ninth Circuit

Nos. 86-6332, 86-6741

Argued and Submitted July 7, 1987

Decided Oct. 14, 1987

The METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California, and the Coachella Valley Water District, a public agency of the State of California,

Plaintiffs-Appellees,

v.

The UNITED STATES of America; Donald P. Hodel, Secretary, U.S. Department of Interior,

Defendants-Appellants,

and

QUECHAN INDIAN TRIBE; Fort Mojave Indian Tribe, and Colorado River Indian Tribes,

Defendants-Intervenors-Appellants,

v.

STATE OF CALIFORNIA and State of Arizona,

Defendants-Appellees.

Water district holding water rights inferior to those of Indian tribes brought action against United States to challenge orders by Secretary of Interior resurveying boundaries of Indian reservation. The United States District Court for the Southern District of California, 628 F.Supp. 1018, Rudi M. Brewster, J., held in favor of districts. The United States and Indian tribes brought interlocutory appeal. The Court of Appeals held that: (1) United States

did not waive sovereign immunity from suit; (2) Quiet Title Act gave United States immunity from suit; and (3) McCarran amendment did not authorize private suits to decide priorities between United States and particular claimants on stream.

Remanded.

Dale T. White (argued), Fredericks & Pelcyger, Boulder, Colo., for Fort Mojave Indian Tribe.

William Strickland, Strickland & Altaffer, Tucson, Ariz., for Quechan Tribe.

Scott B. McElroy, Melody L. McCoy, Native American Rights Fund, Boulder, Colo., William G. Lavell, Pamela S. Williams, Colorado River Indian Tribe, Parker, Ariz., for Colorado River Indian Tribes.

Warren J. Abbott, Karen Tachiki, James F. Roberts, Metropolitan Water Dist. Los Angeles, Cal., Jerome C. Muys (argued), Washington, D.C., for Metropolitan Water Dist.

Sarah P. Robinson (argued), F. Patrick Barry, Land & Natural Resources Div., Washington, D.C., for U.S.

Anthony Ching, Sol. Gen., State of Ariz., Phoenix, Ariz., for State of Ariz.

Justin McCarthy, Redwine & Sherrill, Riverside, Cal., for Coachella Valley Water Dist.

Douglas Noble, Anthony M. Summers, Kenneth R. Williams, Deputy Atty. Gens., Office of the Atty. Gen., Los Angeles, Cal., for State of Cal.

Appeal from the United States District Court for the Southern District of California.

Before BROWNING, Chief Judge, FLETCHER and POOLE, Circuit Judges.

PER CURIAM:

Appellants, the United States and the intervenors, Indian Tribes,[1] bring this interlocutory appeal to challenge the district court's holding (1) that the Secretary of the Interior lacks authority to resurvey the boundary between the Fort Mojave Reservation and other public land; and (2) that, the district court has authority and intends to conduct a trial *de novo* to determine the boundaries of the Reservation.[2] We remand to the district court with direction to dismiss for lack of jurisdiction.

FACTS

The Secretary of the Interior determined that the original survey of the Fort Mojave Reservation was incorrect and that the Reservation's corrected boundaries contained 3500 more acres than the old boundaries. The challenge is to the Secretary's order establishing the new boundary, but the actual dispute between the parties is over the Tribe's claim that it is entitled to an increase of water rights in the Colorado River because of the increase in the Reservation's acreage.

Appellees, the Metropolitan Water District of Southern California (MWD), and the Coachella Valley Water District are California public corporations engaged in the development, storage, and delivery of water to their member public agencies for municipal and domestic use. We refer only to MWD but the references are applicable equally to the Coachella Valley Water District. A major portion of MWD's water supply is obtained under contracts with the Secretary of the Interior for Colorado River water. Under

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[1] Quechan Indian Tribe, Fort Mojave Indian Tribe, and Colorado River Indian Tribes.

[2] The district court has not ruled as yet on boundary orders affecting the Colorado River and Fort Yuma reservations. The issues are the same as those presented by the ruling on the Fort Mojave reservation boundary order. The three tribes have sought the interlocutory appeal and join in one brief.

the contracts, MWD's entitlement to water is subject to the satisfaction of entitlements belonging to entities, such as the Fort Mojave Indian Tribe (Tribe), that hold higher priorities.

In *Arizona v. California,* 373 U.S. 546, 600, 83 S.Ct. 1468, 1497, 10 L.Ed.2d 542 (1963) (*Arizona I*) the Supreme Court established priorities of users of Colorado River water. It held that the Tribe's priority dates from the time of the creation of its reservation and based the amount of its entitlement on the "practicably irrigable acreage" in its reservation. *Id.* at 600-601, 83 S.Ct. at 1498. Contract purchasers such as MWD have lower priorities.

In *Arizona I,* although the Special Master had heard evidence and made recommendations as to the correct boundary for the Reservation, the court reserved the issue for later determination. The dispute as to where the boundary lies arises from inconsistencies in the 1870 legal description of the Hay and Wood Reserve, a portion of the Reservation. The Court allocated to the Tribe the quantity of water necessary to irrigate the practicably irrigable acreage of the reservation as calculated by the Special Master based on the old boundaries. However, the Court provided that: "[T]he quantities fixed . . . shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations [including the Fort Mojave Indian Reservation] are finally determined." *Arizona v. California,* 376 U.S. 340, 345, 84 S.Ct. 755, 758, 11 L.Ed.2d 757 (1964) (Court Decree). The Court retained jurisdiction for the purpose of further modifications and orders that it might deem proper. In 1979 the Court entered a supplemental decree identifying the then perfected rights to the use of the mainstream water in each state and their priority dates as agreed by the parties. *Arizona v. California,* 439 U.S. 419, 99 S.Ct. 995, 58 L.Ed.2d 627 (1979) (Supplemental Decree). Before the Supplemental Decree was entered, new

questions arose. Consequently, the Court appointed Judge Elbert Tuttle to conduct hearings on the various motions.

In June 1974, the Secretary of the Interior, pursuant to a resurvey he had ordered, determined that the original survey of the Fort Mojave Reservation was incorrect and readjusted the Reservation boundaries to enclose 3500 additional acres. Judge Tuttle, as Special Master, after hearing found that this was a final determination. Based on the Special Master's finding, the United States applied to the Supreme Court for a reallocation of water rights to increase the Tribe's share. *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983) (*Arizona II*). Recognizing that the Special Master's finding threatened to diminish its water allocations from the Colorado River, MWD filed this action in the district court for the Southern District of California challenging the Secretary's order. The district court initially stayed this case pending the Supreme Court's decision in *Arizona II.*

In *Arizona II* the Court, finding that the Secretary's determination of the Reservation boundary was not a final determination, apparently because it was made *ex parte* by the Secretary, *id.* at 636, 103 S.Ct. at 1400, declined to decide the case, suggesting that the dispute possibly could be decided in another forum. It specifically referred to this case then pending in the district court as a potential vehicle, stating: "At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes." *Id.* at 638, 103 S.Ct. at 1401. The Court, however, recognized that there might be obstacles to the district court litigation:

> We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limi-

> tations. There will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.

Id.

After the Court's decision in *Arizona II,* the district court lifted its stay in this case. It found that it had jurisdiction, and that the Secretary had exceeded his statutory authority and had not complied with due process in ordering the resurvey. The district court decided it would hold a trial *de novo* to determine the correct boundary. *Metropolitan Water District v. United States,* 628 F.Supp. 1018, 1025 (S.D.Cal. 1986). We granted the Tribe's motion for interlocutory review pursuant to 28 U.S.C. § 1292(b).

JURISDICTION[3]

The Government and the Tribe assert that the quiet Title Act, 28 U.S.C. § 2409a[4] governs this action and, that

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[3] Although not directly raised by the parties, this case presents the additional jurisdictional problem of absence of a case or controversy. MWD filed this action after Special Master Tuttle found that the Secretary's order adding 3500 acres to the Mojave Reservation was a final determination. The tribe then applied to the Supreme Court to have water rights reallocated on the basis of the master's decision (*Arizona II*). At that juncture, a case or controversy seems to have existed since the Secretary's determination had been declared final by the Special Master and was the basis for the Special Master's reallocation of water rights to the disadvantage of plaintiff. The Supreme Court, however, held that the Secretary's action was not a final determination. As long as the order is not final, MWD's water rights are not threatened because those rights cannot be reallocated until there is a final order. The Court's decision in *Arizona II* suggests that before the Secretary's finding that the Reservation included 3500 acres could be deemed final, the Secretary would have to provide "due process" to parties adversely affected and the Secretary's order would have to be judicially reviewed. There is a substantial question, therefore, whether a suit initiated by MWD at this time presents a case or controversy. However, since we conclude the district court was without jurisdiction on other grounds, we do not decide this question.

by its terms, the United States is immune from suit. MWD responds that the Government has waived its claim of sovereign immunity because it did not raise it before the district court and because it has litigated in *Arizona I* and *II.* Additionally, MWD claims that the Quiet Title Act does not apply to this action in any event, and asserts that the district court has jurisdiction under the Administrative Procedure Act and the *McCarran Amendment.*

A. *Waiver*

The United States does not waive sovereign immunity by implication; any waiver must be unequivocally expressed. *Chemehuevi Indian Tribe v. California State Bd. of Equalization,* 757 F.2d 1047, 1052-53 (9th Cir.) *rev'd on other grounds, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985).* Waivers of sovereign immunity are construed strictly and narrowly. *Block v. North Dakota,* 461 U.S. 273, 287, 103 S.Ct. 1811, 1819, 75 L.Ed.2d 840 (1983). For example, merely by instituting a suit, the United States does not consent to be sued on a counterclaim based on a cause of action for which it has not otherwise given its consent to be sued. *See Chemehuevi,* 757 F.2d at 1053; *United States v. Drinkwater,* 434 F.Supp. 457, 460 (E.D.Va.1977).

MWD suggests that by participating in the *Arizona I* and *II* litigation to obtain water rights for the Tribe, the United States has waived its sovereign immunity to any

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[4] 28 U.S.C. § 2409a(a) provides:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands. . . .

ancillary proceeding that might affect those rights.[5] It claims that the United States is litigating in the district court the identical claim it presented and litigated (unsuccessfully) before the Supreme court. In *Arizona II,* at issue, however, was the allocation of water rights. Although the Court declined the reallocation and found that the Secretary's boundary determination was not a final determination that could serve as a basis for the allocation of additional water rights, it did not void the Secretary's action in ordering the resurvey. The authority of the Secretary to issue such orders was not litigated. An application to the Supreme Court under a continuing decree for a reallocation of water rights cannot be viewed, under any stretch of the imagination, as consent by the Secretary to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation boundaries.[6]

B. *Quiet Title Act*

MWD brought suit under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (APA). Section 702 of the APA

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[5] MWD claims also that the United States' lawyer made admissions in the Supreme Court in *Arizona II* that constitute a waiver of immunity that bind the United States. The lawyer remarked that "I hope I do not have to—I disown the motion to dismiss which has been filed by the United States in the district court. . . ." MWD also asserts as evidence of waiver a statement in the United States' amended answer in this case that "[w]here the action merely questions the accuracy of the determination of reservation boundaries, and the legal title to the lands is not at issue, we think the action may go forward pursuant to the Administrative Procedure Act." Because this suit involves more than just the accuracy of the Secretarial determinations, and does put at issue legal title in the sense that it seeks to deprive the Tribe of title, we do not interpret the above statements as a waiver of immunity.

[6] We note that at such time as the Secretary seeks the allocation of water rights based on altered boundaries that adversely affect MWD, the Government should not be able to claim sovereign immunity to avoid challenge to the propriety of the water allocation. *See United States v. Martin,* 267 F.2d 764, 769 (10th Cir. 1959).

waives sovereign immunity for suits against federal officers in which the plaintiff seeks nonmonetary relief. The APA, however, does not waive immunity as to any claims which are expressly or impliedly forbidden by "any other statute that grants consent to suit." The Quiet Title Act (QTA), 28 U.S.C. § 2409a is such an act. *Block v. North Dakota,* 461 U.S. at 286, n. 22, 103 S.Ct. at 1819 n. 22. The QTA permits the United States to be named as a defendant in lawsuits seeking the adjudication of disputed title to land. However, when the United States claims an interest in real property based upon that property's status as trust or restricted Indian lands, the Government is immune from suit under the QTA. *See United States v. Mottaz,* 476 U.S. 834, 106 S.Ct. 2224, 2229-30, 90 L.Ed.2d 841 (1986); *Wildman v. United States,* 827 F.2d 1306, 1309 (9th Cir. 1987).

MWD asserts that the QTA does not apply here because it is not seeking to quiet title in itself. It claims rather that its objective is to prevent the Tribes from gaining an earlier water priority because of the additional land the survey includes in the Reservation. Although MWD may not be seeking to quiet title to the land in itself, it seeks a determination of the boundaries of the Reservation. The effect of a successful challenge would be to quiet title in others than the Tribe.

Congress, in passing the Indian lands exception to the QTA, explained that

> [t]he Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his administration against abridging the historic re-

lationship between the Federal Government and the Indians without the consent of the Indians.

H.R.Rep. No. 1559, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 4547, 4556-67. To allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them. *See Florida Dept. of Business Regulation v. United States Dept. of Interior,* 768 F.2d 1248, 1253-55 (11th Cir. 1985), *cert. denied,* ___U.S. ___, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986). MWD challenges the fundamental authority of the Secretary to establish reservation boundaries and to protect the property interests of Indian tribes. This it cannot do.

C. *Trust or Restricted Indian Lands*

MWD relies on *Spaeth v. United States Secretary of Interior,* 757 F.2d 937 (8th Cir. 1985) to argue that even if the QTA is applicable here, that the United States has not made the requisite showing that the lands at issue are "trust or restricted Indian land." The court in *Spaeth,* in considering the claim that the United States was immune under the Indian lands exception to the QTA, found that title problems, not clarified in the record below, made it impossible to determine whether parts of the land in question were "trust or restricted Indian lands." Accordingly, the court remanded the case to the district court to resolve the title dispute and to determine whether the United States had a substantial claim to the land. MWD's reliance on *Spaeth* is misplaced. The Secretary of the Interior has found the land in this case to be Indian lands; nothing in the record suggests that plaintiffs have superior title or, in fact, any title.

This circuit's recent *Wildman* case puts at rest any possible argument that MWD might assert in this regard. "Nothing in the statute [QTA] or its history suggests that the United States was to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the Government declares that it is the trustee for Indians." *Id.,* at 1309. The *Wildman* court goes on to state that "[s]overeign immunity, therefore, prevents the district court from exercising jurisdiction. The immunity of the government applies whether the government is right or wrong." *Id.* at 1309.

D. *McCarran Amendment*

Finally, MWD asserts that if the QTA applies, the McCarran Amendment nonetheless permits suit here. The McCarran Amendment, 43 U.S.C. § 666 provides that the United States is deemed to have waived its immunity in any suit for the adjudication of rights to the use of water of a river system or other source, or for the administration of such rights. The McCarran Amendment, however, does not authorize private suits to decide priorities between the United States and particular claimants, only suits to adjudicate the rights of all claimants on a stream. *Dugan v. Rank,* 372 U.S. 609, 617-18, 83 S.Ct. 999, 1004-05, 10 L.Ed.2d 15 (1963). This suit is not such a general adjudication.[7]

CONCLUSION

We remand to the district court with direction to dismiss for lack of jurisdiction.

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[7] The ongoing litigation, however, in the Supreme Court under the continuing decree may be such a general adjudication.

APPENDIX B

United States District Court,
S.D. California.

Civ. No. 81-0678-B.

Feb. 25, 1986.

The METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the Coachella Valley Water district, a public agency of the State of California,

Plaintiffs,

v.

The UNITED STATES of America, James Watt, Secretary, United States Department of the Interior, State of Arizona, State of California,

Defendants,

Quechan Indian Tribe, Colorado River Indian Tribes, Fort Mojave Indian Tribe,

Intervenors.

Party holding water rights inferior to those of Indian tribes brought action against United States requesting that certain orders by the Secretary of the Interior purporting to finally determine boundaries of Indian reservations be voided. On cross-motions for summary judgment, the district Court, Brewster, J., held that: (1) Indian reservation resurvey statute prohibiting Secretary of Interior from executing a resurvey in a way that would impair bona fide rights of any claimant affected by such a resurvey, not just the rights of owners of the land, would not permit a resurvey, or consequent relocation of boundaries of reservation, that would affect party holding water rights which would be affected by possible changes in allocations to Indian tribes holding superior water rights; (2) Secretary's *ex parte* review did not comport with due process to which holder of water rights was entitled; but (3) substantial fact issue existed as to boundaries and acreage intended by United States when it established Indian reservation, precluding summary judgment in favor of United States on issue of boundaries of reservation.

Judgment accordingly.

Warren J. Abbott, Karen L. Tachiki, James F. Roberts, Los Angeles, Cal., for plaintiff Metropolitan Water Dist.

F. Patrick Barry, U.S. Dept. of Justice, Washington, D.C., for defendants U.S. and James Watt.

Dale T. White, Fredericks & Pelcyger, Boulder, Colo., for intervenor Fort Mojave Tribe.

Douglas Noble, Deputy Atty. Gen., Los Angeles, Cal., for defendant State of Cal.

Scott B. McElroy, Native American Rights Fund, Boulder, Colo., for intervenor Colorado River Indian Tribes.

William Strickland, Strickland & Altaffer, Tucson, Ariz., for intervenor Quechan Indian Tribe.

OPINION AND ORDER

BREWSTER, District Judge.

I. BACKGROUND

This litigation arises out of disputes concerning the boundaries of the Fort Yuma Indian Reservation, the Colorado River Indian Reservation, and the fort Mojave Indian Reservation. Determination of the boundaries will affect the relative allocations of Colorado River water to the three intervenor Indian tribes and to other users in the States of California and Arizona, including plaintiffs herein. Pursuant to stipulation of the parties, the Court

presently is concerned only with the boundaries of the Hay and Wood Reserve of the Fort Mojave Reservation (hereinafter "the Reserve").

The Reserve portion of the Fort Mojave Reservation was initially surveyed by Lieutenant George Wheeler in 1869 as an addition to the Camp Mojave military fort.[1] The legal description of the Reserve was prepared and adopted by Executive Order in 1870. By an 1890 Executive Order, Camp Mojave and the Hay and Wood Reserve were transferred to the Department of Interior to be held in trust as a reservation for the Fort Mojave Tribe (hereinafter "FMT"). The 1890 Executive Order adopted the 1870 legal description of the Reserve.

After the transfer of these military lands to the Fort Mojave Tribe, a contradiction in the 1870 legal description was discovered. The courses and distances set forth in the description delineate an area containing 9,114.81 acres, although the description places the post marking the western boundary of the Reserve on the left, or east, bank of the Colorado River. Subsequent surveys have shown that if the posts were located on the east bank of the river as it flowed in 1870, the Reserve would contain approximately 5,600 acres, some 3,500 acres less than the acreage contained in the 1870 legal description. To contain 9,114 acres, the western corners would have to be located on the foothills approximately one and one-half miles west of the Colorado River.

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[1] Lieutenant Wheeler was acting under Special Orders No. 222 dated December 15, 1868, which ordered him, *inter alia,* as follows:

> The amount, location, and boundaries of these reservations will be determined by the Post Commander, after consultation with Lieutenant wheeler, the amount of land not to exceed three miles square for the station, and not to exceed the same additional amount for all other purposes. . . .

The court takes judicial notice of the fact that three miles square, or nine square miles, comprises approximately 5,760 acres.

Plaintiff Metropolitan Water district of Southern California (hereinafter "MWD") is a California public corporation engaged in the development, storage, and delivery of water to its member public agencies for municipal and domestic use. A major portion of MWD's water supply is obtained pursuant to 1930 and 1931 "permanent service" contracts with the Secretary of Interior for the receipt of Colorado River water. The contracts were made in accordance with section five of the Boulder Canyon Project Act of 1928, 43 U.S.C. § 617(d). Under the contracts, MWD's entitlement to Colorado River water is subject to satisfaction of the entitlements of those holding higher priorities. The contracts give MWD fourth and fifth priority rights, respectively, to the receipt of 550,000 and 662,000 acre feet of water annually.

In *Arizona v. California,* 373 U.S. 546, 600, 83 S.Ct. 1468, 1497-98, 10 L.Ed.2d 542 (1963), the Supreme Court held that the Indian reservations, including the Fort Mojave reservation, had rights to Colorado River water effective as of the time of the creation of the reservations. Thus, MWD's water entitlement is subordinate to the rights of FMT. Because the Colorado River and fort Yuma reservations were also created before MWD contracted for the receipt of Colorado River water, MWD's entitlement is also subordinate to the water rights of those reservations. The Supreme Court also held in its 1963 decision that a tribe's entitlement is based on the "practicably irrigable acreage" on its reservation. *Id.* at 600-01. Thus, it is obvious that the water rights of MWD are affected by the determination of the practicably irrigable acres on the three reservations.

In the proceedings leading to the Supreme Court's 1963 decision in *Arizona v. California,* Special Master Simon Rifkind, appointed by the Supreme Court, took testimony concerning the disputed boundaries of the Reserve. Special master Rifkind's recommendations to the Supreme Court generally found in favor of the California parties and con-

trary to the larger boundary area advocated by FMT and the United States. However, the Supreme court concluded that there was no necessity to make a boundary determination at that time. *Id.* at 601, 83 S.Ct. at 1498. Article II(D)(5) of the Court's 1964 Decree nevertheless fixed FMT's allocation of Colorado River water according to the recommendations of the Special Master, but provided that "the quantities fixed in this paragraph . . . shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined. . . ." *Arizona v. California,* 376 U.S. 340, 345, 84 S.Ct. 755, 758, 11 L.Ed.2d 757 (1964).

On June 3, 1974, the Secretary of Interior ordered the Reserve to be resurveyed to include 9,114.81 acres, the larger boundary area advocated by FMT and the United States before Special Master Rifkind in 1963 (hereinafter the June 1974 order). The June 1974 order had the effect of adding approximately 3,500 acres to the area of the Reserve beyond the area established by the last Department of Interior survey in 1928. The Secretary rejected the portion of the 1870 legal description of the Reserve that marked the western boundary by reference to posts located near the left (east) bank of the Colorado River. He ordered that the western boundary be reestablished to conform to the acreage description of 9,114.81 acres. The June 1974 order was based upon an in-house investigation conducted by the Department of Interior's legal staff. MWD was not afforded the opportunity to participate, either by way of comment or hearing, in the investigation.

In 1978, the United States and FMT moved the Supreme Court to increase the tribe's water allocation based on the Secretary's June 1974 order. Special Master Elbert Tuttle agreed with the United States and FMT that the Secretary of the Interior had "finally determined" the reservation's boundaries within the meaning of Article II(D)(5) of the Court's 1964 Decree. He recommended that the Court

award FMT increased water rights commensurate with the increased practicably irrigable acreage.

The Supreme Court rejected this recommendation, stating:

> In our 1963 opinion, when we set aside Master Rifkind's boundary determinations as unnecessary and referred to possible future final settlement, we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies, or private water users holding priority rights.

Arizona v. California, 460 U.S. 605, 636, 103 S.Ct. 1382, 1400, 75 L.Ed.2d 318 (1983). The Court added, however, "we now intimate nothing as to the Secretary's power or authority to take the actions that he did or as to the soundness of his determinations on the merits". *Id.* at 637, 103 S.Ct. at 1400-01. The Court then made reference to the instant litigation, which had been instituted by MWD and the Coachella Valley Water district in July 1981 as follows:

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary dispute would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes.

Id. at 638, 103 S.Ct. at 1401.

In this action, plaintiffs request this court to void the June 1974 order and other orders by the Secretary of Interior purporting to finally determine the boundaries of

the Fort Yuma, Fort Mojave, and Colorado River reservations. The plaintiffs also seek a declaration of the location of the boundaries different from those fixed by the Secretary's orders. Since the tribes' water rights have priority over plaintiffs' rights, any increases in the tribal allocations will diminish the quantity of water MWD may divert in any year in which the State of California is restricted to 4.4 million acre-feet of water or less.

Before the court now, therefore, are the following motions: (1) defendant the United states seeks summary judgment affirming the June 1974 Interior Department order; (2) plaintiff MWD brings a cross motion for summary judgment, asking the court to find the June 1974 order void and to declare that the western boundary of the Reserve is the left (east) bank of the Colorado river in its last natural course—defendant California has submitted a statement in support of MWD's summary judgment motion; (3) intervenor FMT seeks partial summary judgment affirming the June 1974 order; and (4) the United states and FMT move to strike certain documents and affidavits submitted by MWD and California as outside the administrative record.

II. SCOPE OF REVIEW

The first issue presented by these motions is the scope of review of the Secretary's June 1974 order.[2] This requires the court initially to determine whether there was statutory authority for the Secretary's action.

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[2] The court does not interpret the Supreme Court's holding in the 1983 *Arizona v. California* decision, that the June 1974 order was not a "final determination" within the meaning of the 1964 Decree, to require this court to make a *de novo* determination. Instead, the court reads the Supreme Court's *caveat* that "we . . . intimate nothing as to the Secretary's power or authority to take the actions that he did", 460 U.S. at 637, 103 S.Ct. at 1400, to allow this court independently to determine whether the Secretary had authority to issue his June 1974 order.

A. *Secretary's Authority to Issue the June 1974 Order.*

The Secretary of Interior asserts authority to order the resurvey of the Hay and Wood Reserve under 43 U.S.C. § 772. that statute provides:

> The Secretary of the Interior may, in his discretion, cause to be made, as he may deem wise under the rectangular system now provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided,* That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement. (emphasis in original)

MWD contends that the proviso to this section deprived the Secretary of authority to order the resurvey of the Reserve, since MWD is a "claimant" whose contractual right to the allocation of Colorado River water is adversely affected by the addition of more practicably irrigable acreage to the Reserve. The United States and FMT argue that the proviso-only protects rights to the possession of land within the area to be resurveyed.

The language of the proviso suggests it was meant to have a broad sweep. It prohibits the Secretary from executing a resurvey in a way that would impair the bona fide rights of *any claimant* affected by such resurvey, not just the rights of owners of land. The words "any claimant" indicate to the court that Congress intended to protect the entire spectrum of rights of claimants that might be affected by a land resurvey. The court holds that spectrum of rights to include water rights that are affected by the acreage of lands to be resurveyed.[3]

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[3] The sparse legislative history on the proviso sheds little, if any, light on its interpretation.

Furthermore, as discussed below, accepting the interpretation advocated by the United States and FMT would raise a serious question whether section 772, as applied to this situation, comports with due process. The statute vests the Secretary with broad discretion to order resurveys, without requiring that potentially aggrieved parties be allowed to participate in the decision-making process.[4] Ambiguous statutes should, if possible, be construed to avoid a constitutional question. *See, e.g., Energy Reserves Group, Inc. v. Kansas Power Light Co.,* 459 U.S. 400, 410 n. 10, 103 S.Ct. 697 703 n. 10, 74 L.Ed.2d 569 (1983). Thus, this court reads the word claimant broadly to avoid interpreting section 772 to allow the Secretary to affect property interests without providing due process to affected interests.

The court concludes that, by virtue of the fact that MWD's water rights are affected by changes in the allocations to tribes holding superior water rights, MWD is a claimant to water rights in the Colorado River and is affected by the June 1974 order to resurvey the Reserve. The Secretary thus lacked authority to issue the June 1974 order, and the order must be set aside pursuant to 5 U.S.C. § 706(2)(C) (reviewing court shall set aside agency action found to be in excess of statutory authority). Since the Secretary lacks authority to relocate the instant boundaries, this court must make a *de novo* determination of the proper location of the boundary.

B. *Procedural Due Process.*

Even if the Secretary possessed authority under section 772 to issue the June 1974 order, the court is also charged by 5 U.S.C. § 706(2)(D) to set aside agency action taken without observance of the procedures required by law, in-

[4] This court concludes below that MWD's water rights are property interests protected by the due process clause.

cluding the requirements of the due process clause of the fifth amendment.[5]

The first step in a procedural due process analysis is to determine whether a liberty or property interest is at stake.[6] *Board of Regents v. Roth,* 408 U.S. 564, 570-71, 92 S.Ct. 2701, 2705-06, 33 L.Ed.2d 548 (1972).

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim or entitlement to it.

Id. at 577, 92 S.Ct. at 2709. MWD contends that its 1930 contract and its 1931 supplemental contract with the Secretary of Interior for the receipt of Colorado River

[5] 5 U.S.C. § 706 provides in relevant part as follows:

> The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (D) without observance of procedure required by law.

[6] The United States and FMT raise a threshold argument that the Metropolitan Water district, as a public entity created by the State of California, is not a "person" protected by the fifth amendment. Although the Supreme Court has stated, without explanatory analysis, that the "States of the Union" cannot be considered "persons" under the fifth amendment, *South Carolina v. Katzenbach,* 383 U.S. 301, 323-24, 86 S.Ct. 803, 815-16, 15 L.Ed.2d 769 (1966), it is doubtful that this conclusion applies to state-created public corporations such as MWD. It is well established that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law. *Covington and Lexington Turnpike Road Co. v. Sandford,* 164 U.S. 578, 592, 17 S.Ct. 198, 203, 41 L.Ed. 560 (1896); *See First National Bank of Boston v. Bellotti,* 435 U.S. 765, 780 n. 15, 98 S.Ct. 1407, 1418 n. 15, 55 L.Ed.2d 707 (1978). The court concludes that MWD is protected by the due process clause.

water in perpetuity created a property interest for due process purposes.

FMT argues that the contracts do not create a property interest because they recite that the United States is not obligated to deliver water when delivery would interfere with the entitlement of those with priority rights, such as FMT. Assuming FMT's interpretation of the contracts is correct, the contracts nevertheless cannot be reasonably interpreted to vest the Secretary of Interior with unilateral authority to enlarge the allocations to those with priority rights. The contracts do not put MWD on notice that, by *ex parte* application of priority users, the United States could permanently diminish the value of MWD's contractual allocation.

The 1930 contract, as supplemented by the 1931 contract, provides that MWD has a fourth priority right to the receipt of 550,000 acre feet of water annually and a fifth priority right to 662,000 acre feet annually. The amounts of water to be diverted to the holders of higher contractual priorities are also set forth in the contracts. The 1930 contract states that it is for "permanent service". The court must conclude that the contracts vest MWD with a legitimate claim of entitlement to the receipt of Colorado River water according to the priorities listed on these contracts, and that this claim is a property right cognizable by the fifth amendment.

The conclusion that MWD has a property interest in its contractual allocation is supported by language from the Supreme Court's 1983 *Arizona v. California* decision. Responding to the dissent's contention that the tribes should be awarded an immediate increase in their water rights based on the *ex parte* secretarial orders, the majority noted that "[t]he dissent's reasoning would also deprive the States, albeit on a 'conditional basis,' . . . of valuable water rights now vested in them, without affording them the slightest semblance of a fair hearing on their claims. *Cf.*

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (invalidating a procedure allowing prejudgment taking of property without notice or hearing)." 460 U.S. 605, 639 n. 28, 103 S.Ct. 1382, 1401 n. 28, 75 L.Ed.2d 318 (1983). Implicit in this statement and the citation of *Fuentes* is the conclusion that the states had a property interest in the receipt of Colorado River water. If so, then so also does MWD, by virtue of its 1930 and 1931 contracts.

The second step in the procedural due process inquiry is to determine whether the Secretary's procedures comported with due process. Due process requires, at a minimum, notice and an opportunity to be heard. *Gross v. Lopez,* 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975). MWD did not receive notice of the investigation preceding the June 1974 order, nor was it afforded an opportunity to express its views either in writing or by way of evidentiary hearing at any point in the decision-making process. The Secretary's *ex parte* review fell far short of the procedures required by due process. Pursuant to 5 U.S.C. § 706(2)(D), the court, therefore, voids the June 1974 order.

Under this alternative ground for invalidating the June 1974 order, the court is authorized to make a *de novo* determination of the boundaries of the Reserve. In *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971), the Supreme Court held that "*de novo* review is authorized when the action is adjudicatory in nature, and the agency fact-finding procedures are inadequate". *See Camp v. Pitts,* 411 U.S. 138, 141-42, 93 S.Ct. 1241, 1243-44, 36 L.Ed.2d 106 (1973); *Porter v. Califano,* 592 F.2d 770, 782-84 (5th Cir. 1979) (ordering *de novo* review where agency's fact-finding held to be biased).

The *Overton Park* requirements are met in this case. First, the boundary determination was adjudicatory in na-

ture. En route to the June 1974 order, the Secretary made a factual finding regarding the intent of Lieutenant George Wheeler when he surveyed the Reserve. This finding of fact in turn was based on subsidiary factual findings regarding Wheeler's surveying methods and procedures. The Secretary's order falls in the broad category of agency action characterized as informal adjudication. *See City of West Chicago v. United States Nuclear Regulatory Commission,* 701 F.2d 632, 644 (7th Cir. 1983) and authorities cited therein. Second, the court has already found that the procedures used to resolve these factual questions were inadequate because they failed to comport with minimum standards of due process.

To summarize, the court concludes that it should make a *de novo* determination of the boundaries of the Reserve based on two alterative grounds: (1) the June 1974 order exceeded the Secretary's statutory authority; and (2) the fact-finding procedures used to adjudicate the boundary did not comport with due process. The court notes that this conclusion is buttressed by its concern for both the appearance and reality of objectivity in decision-making. The appearance of objectivity is not furthered when the Secretary of the Interior acts as the arbiter of boundary disputes whose resolution has a massive impact on rights to Colorado River water and, at the same time, serves as trustee for three of the Indian tribes which have a significant stake in the outcome. *Cf. Porter v. Califano,* 592 F.2d at 782-84. The need for the appearance of objectivity favors *de novo* determination by this court.

Having determined that *de novo* review is proper, the court finds its appropriate to consider all evidence presented by the parties, including evidence not made a part of the administrative record. Accordingly, the motions to strike by the United states and FMT should be denied.

III. THE MOTIONS

In addition to conducting a lengthy oral hearing, the court has thoroughly reviewed the evidence submitted by all parties regarding the boundaries of the Reserve, including the Administrative Record, the appendix documents submitted by MWD, and the affidavits submitted by MWD and the State of California. The court concludes that there are genuine issues of material fact in dispute.

The dispute concerning the boundaries of the Reserve arises from the contradiction in the Reserve's 1870 legal description, as discussed above. The parties are in basic agreement on the legal ground rules for resolving this contradiction. Generally, calls to monuments (such as the banks of a river) should prevail over calls to courses and distances. *See, e.g., United States v. State Investment Co.,* 264 U.S. 206, 211, 44 S.Ct. 289, 290, 68 L.Ed. 639 (1924). An exception to this rule, however, is that it should not be adhered to when to do so would defeat the intent of the grantor. *See, e.g., Bartlett Land & Lumber Co. v. Saunders,* 13 Otto 316, 103 U.S. 316, 322, 26 L.Ed. 546 (1881). Thus, the court must determine the intent of the grantor of the Reserve, if possible to ascertain.

The court finds that there is a lively dispute as to the boundaries and acreage intended by the United States when it established the Reserve. As a guide to the parties, the court notes that it is not as convinced as the parties appear to be that the boundaries actually surveyed by Lieutenant Wheeler are determinative of the intent of the grantor. In later proceedings, the parties should be prepared to address whose intent constitutes the intent of the grantor. For instance, the intent of those giving instructions to Wheeler may be more probative of the intent of the grantor than Wheeler's intent. In any event, the conflicting evidence regarding the intent of the grantor precludes summary judgment at this point. The court be-

lieves that a trial will be necessary to resolve this factual dispute.

The parties will be contacted shortly for the purpose of arranging a status conference at which a discovery schedule and a trial date will be established.

ORDER

Based on the above opinion, IT IS HEREBY ORDERED THAT:

(1) The Secretary's June 1974 order is void. To this extent, MWD's motion for summary judgment on the second claim for relief in the second amended complaint is GRANTED IN PART.

(2) In all other respects, MWD's motion for summary judgment is DENIED.

(3) The motions for summary judgment by the United States nd the Fort Mojave Tribe are DENIED.

(4) The motions of the United States and FMT to strike affidavits and appendix documents are DENIED.

Supreme Court, U.S.
FILED
MAR 17 1988
SPANIOL, JR.
CLERK

No. 87-1165

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

JAMES L. BYRNES
Acting Assistant Attorney General

EDWARD J. SHAWAKER
SARAH P. ROBINSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court has jurisdiction over this suit challenging the United States' claim that it holds title to certain land in trust for the benefit of an Indian Tribe.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 830 F.2d 139. The opinion of the district court (Pet. App. 12a-26a) is reported at 628 F. Supp. 1018.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1987, and the petition for a writ of certiorari was filed on January 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a challenge by petitioners to orders of the Secretary of the Interior that redetermined the boundaries of three Indian Reservations for which reserved water rights were recognized in *Arizona* v. *California*, 373 U.S. 546, 598-600 (1963) (*Arizona* v. *California I*). The dispute

over the boundaries of the three Reservations was left unresolved in *Arizona* v. *California,* 460 U.S. 605, 628-641 (1983) (*Arizona* v. *California II*).

In the instant case, the parties agreed to litigate first the validity of the Secretary's order that redetermined the boundary of a portion of the Fort Mojave Indian Reservation, located in southern California and Arizona. In that order, which was entered on June 3, 1974, the Secretary resolved an internal inconsistency in the original legal description of the Hay and Wood Reserve portion of the Reservation. The Secretary determined that approximately 3500 acres that were treated in 1974 as non-Indian public lands, managed by the Bureau of Land Management, were actually part of the original Reservation. The Secretary therefore declared null and void a 1928 survey of the Hay and Wood Reserve that had erroneously excluded the 3500 acres and directed a resurvey to add that area to the Reservation. The plat of the resurvey was filed on November 6, 1978. Pet. App. 3a & n.2, 11a, 13a-14a, 16a; *Arizona* v. *California II,* 460 U.S. at 631-632.

2. As noted above, the controversy concerning the size of the Fort Mojave Reservation has surfaced twice in *Arizona* v. *California,* in which this Court apportioned the waters in the Lower Basin of the Colorado River. In *Arizona* v. *California I* the Court held that the Boulder Canyon Project Act, 43 U.S.C. (& Supp. III) 617-617t, mandates a scheme for apportioning the mainstream waters of the Colorado River among the states in the Lower Basin and empowers the Secretary of the Interior to effectuate that apportionment by making contracts for the delivery of water. 373 U.S. at 564-565. Under the statutory scheme, however, the Secretary must satisfy certain prior rights, called "present perfected rights," before furnishing water under

contracts. *Id.* at 584. See *Bryant* v. *Yellen,* 447 U.S. 352, 364-365 (1980).[1] The two public water agencies that are petitioners in this case, the Metropolitan Water District (MWD) and the Coachella Valley Water District, receive Colorado River water under Project Act contracts with the Secretary. By contrast, the United States has a present perfected right to the use of sufficient Colorado River water "to irrigate all the practicably irrigable acreage" on the Fort Mojave Reservation. *Arizona* v. *California I,* 373 U.S. at 600. That right was reserved for the benefit of the Fort Mojave Tribe when the Reservation was established in 1890 and 1911 (376 U.S. 340, 345 (1964) (decree)), and therefore is senior to the rights of the two water-agency petitioners. Accordingly, if the 3500-acre area at issue here is part of the original Reservation, the United States is entitled to a reserved water right—with a priority date senior to the contractual rights of the water-agency petitioners—for any practicably irrigable acreage within that area.

In hearings preceding the decision in *Arizona* v. *California I,* Special Master Rifkind received evidence on the boundary question and concluded that the United States was bound by the 1928 survey that drew the boundary of the Fort Mojave Reservation to exclude the 3500 acres. He then relied on that boundary determination in calculating the number of practicably irrigable acres on the Reservation and the corresponding number of acre-feet of water necessary to satisfy the present perfected right for the Reservation.

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[1] The Court defined "perfected rights" as, inter alia, "water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use." The Court defined "present perfected rights" as "perfected rights * * * existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act." *Arizona* v. *California,* 376 U.S. 340, 341 (1964) (decree).

However, the Court declined to adopt Special Master Rifkind's recommendation regarding the boundary issue, explaining (373 U.S. at 601):

> We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time.

Nevertheless, in its 1964 decree, the Court used Special Master Rifkind's calculations, which excluded the 3500 acres, in establishing the amount of water reserved for the Reservation. 376 U.S. at 345. But the Court included a proviso in its decree that contemplated a future resolution of the boundary dispute (*ibid.*):

> [T]he quantities fixed * * * shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations [including the Fort Mojave Indian Reservation] are finally determined.

See also 439 U.S. 419, 421, 426 (1979) (supplemental decree).

3.a. After the Secretary filed the official plat of the resurvey of the Hay and Wood Reserve in November 1978 (see page 2, *supra*), the United States filed a motion in this Court in December 1978 requesting the Court to amend the decree in *Arizona* v. *California* to increase the quantity of water to which the United States is entitled for the Fort Mojave Reservation. The United States argued that the Secretary's 1974 order and 1978 resurvey had "finally determined" the boundary of the Reservation within the meaning of the proviso to the 1964 decree of this Court, quoted above, and that the United States, on behalf of the Tribe, was therefore entitled to the additional water necessary to

irrigate the "practicably irrigable acreage" within the 3500-acre area that was restored to the Reservation. The Court referred the United States' motion to amend the decree to the new Special Master, Elbert P. Tuttle. 439 U.S. at 436-437 (supplemental decree).

In a preliminary report issued on August 28, 1979, Special Master Tuttle agreed with the United States that the Secretary's 1974 order had "finally determined" the boundary of the Fort Mojave Reservation and that the decree should be amended to increase the quantity of water under the present perfected right for the Reservation. *Arizona* v. *California II*, 460 U.S. at 612-613. However, on July 21, 1981, before the Special Master issued his final report, petitioners MWD and Coachella filed the instant suit against the Secretary of the Interior in the United States District Court for the Southern District of California.[2] Invoking the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, as a basis for judicial review, petitioners requested the court to set aside the Secretary's 1974 order and to issue a declaratory judgment locating the western boundary of the Hay and Wood Reserve so as to exclude the 3500 acres from the Reservation. The district court stayed its proceedings pending this Court's ruling on the exceptions to Special Master Tuttle's final report. Pet. App. 5a.

b. In *Arizona* v. *California II*, the Court rejected Special Master Tuttle's recommendation that the Court amend the decree to increase the quantity of water allocated to the Fort Mojave Reservation on the basis of the Secretary's 1974 order and the 1978 resurvey. The Court stated that when it rendered the decision in *Arizona* v. *California I* and

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[2] The States of California and Arizona were subsequently joined as defendants. Pet. 2.

entered the implementing decree, it

> in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies, or private water users holding priority rights.

460 U.S. at 636. The Court then expressed its preference that the boundary dispute be settled outside of the proceedings in *Arizona* v. *California,* and the Court referred specifically to the instant case, which was then pending (but had been stayed) in the district court (*id.* at 638 & n.27). At the same time, the Court recognized that there might be jurisdictional obstacles that would render it impossible for the district court to resolve the boundary issue in this case (*id.* at 638 (footnotes omitted)):

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.

See also *id.* at 658 n.10 (Brennan, J., dissenting).

4. The proceedings in the instant case recommenced after this Court rendered its decision in *Arizona* v. *California II.* As petitioners note (Pet. 10), on June 17, 1983, the United States withdrew most of the jurisdictional objections that it had raised in the motion to dismiss to which this Court referred in *Arizona* v. *California II.* Thereafter, in a decision rendered on February 25, 1986, the district court set aside the Secretary's order under the APA (Pet. App. 12a-26a).

The court first held that the 1974 order and 1978 resurvey exceeded the Secretary's statutory authority within the meaning of the APA, 5 U.S.C. 706(2)(C). The court relied on 43 U.S.C. 772, which permits the Secretary to resurvey public lands but provides that "no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement." The court rejected the contention by the United States and the Tribes that the quoted proviso protects only those persons who claim an interest in the land itself, and concluded instead that petitioner MWD must be regarded as a "claimant" because its contractual water rights would be affected if the United States is entitled to a reserved water right to irrigate land in the area added to the Reservation by the resurvey. Pet. App. 19a-20a.

The court also held that the Secretary's 1974 order was issued without observance of procedures required by law within the meaning of the APA, 5 U.S.C. 706(2)(D), because it adversely affected the water agencies' property rights under their water right contracts without affording them an opportunity to be heard (Pet. App. 20a-24a). Having set aside the Secretary's order, the court concluded that it would make a de novo determination of the proper location of the disputed boundary, rather than remanding the matter to the Secretary, and it therefore set the case for further proceedings (*id.* at 20a, 24a).

5. The district court certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals granted leave to appeal. In considering the issues to be raised on appeal, we re-examined the question of the district court's jurisdiction in light of two court of appeals decisions that had been rendered since the United States withdrew its jurisdictional objections in the district court. See *Fadem* v. *United States,* 791 F.2d 1381 (9th Cir. 1986) (holding that a challenge to a boundary survey under 43 U.S.C. 772 may be brought only under the Quiet Title Act (QTA), 28 U.S.C. 2409a(a)); and *Florida Dep't of Business Regulation* v. *United States Dep't of Interior,* 768 F.2d 1248 (11th Cir. 1985) (holding that the "Indian lands" exception to the Quiet Title Act, 28 U.S.C. 2409a(a), bars a suit under the APA challenging the Secretary's right to hold land in trust for Indians), cert. denied, 475 U.S. 1011 (1986). Based on those decisions and their elaboration upon the principles of sovereign immunity under the Quiet Title Act announced in *Block* v. *North Dakota,* 461 U.S. 273 (1983), and *United States* v. *Mottaz,* 476 U.S. 834 (1986), the United States renewed its argument that the district court was without jurisdiction in this case. The court of appeals agreed and remanded the case with directions to dismiss the complaint (Pet. App. 1a-11a).

The court of appeals first rejected petitioners' contention that the United States had waived its sovereign immunity to suit in the district court by intervening in the original proceedings in this Court in *Arizona* v. *California* (Pet. App. 7a-8a). The court of appeals next held that the APA does not furnish the requisite waiver of sovereign immunity, because the APA "does not waive immunity as to any claims which are expressly or impliedly forbidden by 'any other statute that grants consent to suit' " (*id.* at 9a (quoting 5 U.S.C. (& Supp. IV) 702)). The court concluded that the QTA is such a statute, because it grants consent to certain

suits challenging the United States' title to real property but expressly withholds consent to suits challenging the United States' title to "trust or restricted Indian lands" (28 U.S.C. 2409a(a)). Pet. App. 9a. The court rejected petitioners' contention that the QTA is inapplicable because petitioners do not assert an interest in the 3500 acres that were included in the Reservation by the resurvey of the boundary. It reasoned that "[t]he effect of a successful challenge would be to quiet title in others than the Tribe" (*ibid.*) and that "[t]o allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them" (*id.* at 10a). Finally, the court of appeals held that the McCarran Amendment, 43 U.S.C. 666, does not provide the necessary consent to this suit because this suit is not a general stream adjudication (Pet. App. 11a, citing *Dugan* v. *Rank,* 372 U.S. 609, 617-618 (1963)).

ARGUMENT

The court of appeals correctly held that Congress has not waived the sovereign immunity of the United States to this suit challenging the United States' claim that it holds land in trust for the Fort Mojave Indian Tribe. That holding is fully consistent with this Court's decisions in *Block* v. *North Dakota,* 461 U.S. 273 (1983), and *United States* v. *Mottaz,* 476 U.S. 834 (1986), and with the decisions of other courts of appeals. Moreover, petitioners do not suffer any immediate injury by the decision below, because the 1974 Secretarial order they challenge cannot result in an allocation of more water for the benefit of the Tribe unless and until petitioners have been afforded a suitable opportunity to challenge that order and this Court amends its decree in *Arizona* v. *California.* Review of the jurisdictional ruling below therefore is not warranted.

1. The APA neither furnishes petitioners with a cause of action nor waives the United States' immunity to suit in this case. Although the APA provides a broad waiver of sovereign immunity to suits challenging agency action where the relief sought is other than money damages, that waiver, by its terms, does not "affect[ ] other limitations on judicial review" or "confer[ ] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. (& Supp. IV) 702. Here, the entire subject matter of challenges to claims by the United States to real property is comprehensively governed by the Quiet Title Act (QTA), 28 U.S.C. 2409a, and the QTA therefore displaces the APA as the avenue of judicial review. The QTA in turn expressly precludes judicial review (see 5 U.S.C. 701(a)(1)) and forbids relief affecting the United States' title where the plaintiff challenges the United States' claim of title to real property for the benefit of Indians. See 5 U.S.C. 702; 28 U.S.C. 2409a(a).

a. In the QTA, Congress waived the United States' immunity to certain suits to quiet title to land in which the United States claims an interest. *Block* v. *North Dakota*, 461 U.S. at 280. However, Congress expressly retained the United States' immunity to suits challenging the United States' title to "trust or restricted Indian lands." 28 U.S.C. 2409a(a).[3] As a result of this exception, "[w]hen the United

[3] The Quiet Title Act provides in pertinent part (28 U.S.C. 2409a(a)):

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425 and 7426) or section 208 of the Act of July 10, 1952 (43 U.S.C. 666) [the McCarran Amendment].

States claims an interest in real property based on that property's status as trust or restricted Indian land, the Quiet Title Act does not waive the Government's immunity." *Mottaz*, 476 U.S. at 843 (footnote omitted). As this Court has pointed out (*Block*, 461 U.S. at 273; *Mottaz*, 476 U.S. at 842-844), and as the court below explained (Pet. App. 9a-10a), Congress decided to retain sovereign immunity from suits challenging the United States' title to Indian land in order to protect the "solemn obligations" and "specific commitments" made by the United States to Indian people against disruption by third parties. H.R. Rep. 92-1559, 92d Cong., 2d Sess. 13 (1972). Congress was concerned that "[a] unilateral waiver of the Federal Government's immunity would subject these lands to suit without the Indians' consent." *Mottaz*, 476 U.S. at 843 n.6.

This Court has twice held that " 'Congress intended the QTA to provide the *exclusive* means by which adverse claimants could challenge the United States' title to real property.' " *Mottaz*, 476 U.S. at 841 (quoting *Block*, 461 U.S. at 286 (emphasis added)). If it were otherwise, the Court stressed, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted" (*Block*, 461 U.S. at 284-285). In particular, the Court observed that if it "were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory" (*id.* at 285). Prior to its decision in the instant case, the Ninth Circuit had held that, under *Block* v. *North Dakota*, the QTA is the exclusive avenue for resolution of all boundary disputes with the Federal Government, because the location of the boundary serves to delineate the Government's claim of an interest in the property enclosed. *Fadem* v. *United States*, 791 F.2d 1381, 1382-1383 (1986). The Ninth Circuit's decision in the instant case simply applies that prin-

ciple to a dispute over the location of a boundary that encloses lands held in trust for Indians: Because the QTA expressly bars suits concerning title to Indian trust lands, it necessarily bars this suit concerning the location of a boundary that encloses such lands. *Block* v. *North Dakota* makes clear that petitioners cannot circumvent that bar by bringing a suit under the APA. 461 U.S. at 286 n.22.

b. Petitioners nevertheless seek to avoid that bar by contending (Pet. 19-24) that the QTA is inapplicable here because they do not claim title to the 3500 acres in question or seek to divest the United States of title to that land. Contrary to petitioners' view, however, the fact that they claim no interest in the land itself weighs against, not in favor of, recognizing a right in petitioners to bring the instant suit. When Congress passed the QTA, it permitted challenges to the United States' claim of title to real property to be brought only by plaintiffs who themselves claim an interest in the same property. This limitation is evident from the requirement that the complaint in a QTA action "shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property" (28 U.S.C. 2409a(c)). The purpose of the QTA is to authorize the district court to resolve the conflicting claims and to quiet title as between the adverse parties. By contrast, Congress did not consent to suits by third parties, such as petitioners herein, who might wish to bring about the resolution of a dispute over the United States' claim of title to property, but who have no interest in the property itself. Without such a limitation, the United States would be exposed to numerous lawsuits by mere bystanders and intermeddlers.

Moreover, as the court of appeals concluded, although the petitioners "may not be seeking to quiet title to the land in [themselves,]" the "effect of a successful challenge would be to quiet title in others than the Tribe" (Pet. App. 9a)—

namely, in the United States, which would then hold the land in fee simple, rather than in trust for the Tribe.[4] Thus, "[t]o allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them" (*id.* at 10a).[5] That is precisely the consequence that Congress sought to avoid by including in the QTA the bar to suits challenging the trust status of lands that the United States claims on behalf of Indians. Because the relief peti-

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[4] Indeed, petitioners seek to assert the interests of the United States in claiming fee ownership of the 3500 acres, in derogation of the Tribe's beneficial interest. There is no reason to believe that Congress intended to permit third parties to invoke the jurisdiction of the courts in order to advance the government's interests in this manner.

[5] Contrary to petitioners' contention (Pet. 21-22), nothing in the decision below affects the authority of a court in a criminal prosecution or habeas corpus action to consider the question of reservation boundaries for purposes of determining the criminal jurisdiction of the federal, state and tribal governments. For this reason, *Solem* v. *Bartlett*, 465 U.S. 463 (1984), cited by petitioners (Pet. 22), is inapposite, because the Court there considered whether Congress, by statute, had diminished the political boundaries of an Indian reservation; the Court did not address questions of title. In *Navajo Tribe of Indians* v. *New Mexico*, 809 F.2d 1455 (10th Cir. 1987), also cited by petitioners (Pet. 21), the court in fact held that the QTA is the exclusive avenue for challenging the United States' title (*id.* at 1468-1469); in the passage quoted by petitioners, the court stated that an adjudication of boundaries is conceptually distinct from an adjudication of title because boundary questions may affect political jurisdiction (*id.* at 1475). Here, by contrast, only the question of title is presented. Finally, *Pueblo of Taos* v. *Andrus*, 475 F. Supp. 359 (D.D.C. 1979), upon which petitioners rely (Pet. 21), is not at all instructive, because it was decided before this Court held in *Block* and *Mottaz* that the QTA is the exclusive means for challenging the United States' title.

tioners seek therefore is expressly forbidden by the QTA, it may not be granted by a court under the APA.[6]

The Eleventh Circuit reached the same conclusion in similar circumstances in *Florida Dep't of Business Regulation* v. *United States Dep't of Interior,* 768 F.2d 1248 (1985), cert. denied, 475 U.S. 1011 (1986). There, the State of Florida and several of its subdivisions sued the Secretary of the Interior under the APA challenging the Secretary's decision to take a certain parcel of land in trust for the Seminole Tribe under 25 U.S.C. 465. The plaintiffs did not assert any property interest in the land and did not seek to quiet title to the land in themselves. 768 F.2d at 1254. Rather, they objected to the decision to take the land in trust because the Seminole Tribe used the trust land to sell tax-free cigarettes and operate bingo games. *Id.* at 1250-1251. In holding that the suit was barred by the QTA, the Eleventh Circuit explained (*id.* at 1254-1255 (footnotes omitted)):

> Appellants quite forcefully contend that this is not a suit to quiet title, because they do not seek to have title to the land quieted in them, nor do they seek recognition of any property interest in the land. Although technically the suit in the instant case is not one to quiet title, we conclude that Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here. By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes. Here, the appellants seek an order divesting the United States of its title to land held for the benefit of an Indian tribe. That appellants do not assert an adverse claim of title to the land, however, does not lessen the interference with the trust relationship a divestiture would cause. Moreover, Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust. It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands. Hence we conclude that the APA waiver of immunity is inapplicable in this instance.

[6] Petitioners' effort to circumvent the QTA is further undermined by the fact that their ultimate goal is to divest the United States and the Tribe of the reserved water right for irrigable acreage in the area restored to the Reservation by the 1974 order and 1978 resurvey. The QTA expressly precludes suits concerning the validity of "water rights." 28 U.S.C. 2409a(a). Thus, petitioners seek to avoid both the "Indian lands" and "water rights" exceptions to the QTA.

c. Finally, petitioners contend (Pet. 24-26) that the Ninth Circuit misapplied the "Indian lands" exception in the circumstances of this case. Petitioners rely on *Spaeth* v. *United States Secretary of Interior,* 757 F.2d 937 (8th Cir. 1985), where the court held that in order to invoke the Indian lands exception, the United States must show that there is a "substantial possibility" that the lands in question are trust or restricted Indian lands. *Id.* at 943. This argument is erroneous for several reasons.

First, the Eight Circuit's decision in *Spaeth* preceded this Court's decision in *Mottaz,* in which the Court stated that "when the United States *claims* an interest in real property based on that property's status as trust or restricted Indian land, the Quiet Title Act does not waive the government's immunity." 476 U.S. at 843 (emphasis added; footnote omitted). Thus, the protection afforded the United States and the Tribe by the Indian lands exception turns on the nature of the United States' claim, not on whether a court finds a "substantial possibility" that the United States will

prevail on the merits of that claim. As the court of appeals held in this case, the United States is not " 'to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the Government declares that it is the trustee for Indians.' " Pet. App. 10a-11a (quoting *Wildman* v. *United States*, 827 F.2d 1306, 1309 (9th Cir. 1987)).

Second, even if we assume that the Eighth Circuit would follow *Spaeth* in light of this Court's intervening decision in *Mottaz*, this case presents no conflict with *Spaeth*. The district court here expressly found that there was an inconsistency in the legal description of the Reservation and that there are "genuine issues" of material fact and a "lively dispute" regarding the boundaries and acreage intended by the United States when the Reservation was established (Pet. App. 16a, 25a). Moreover, the Secretary of the Interior made a formal determination, based on an exhaustive analaysis of numerous documents, that the land in question is held in trust for the benefit of an Indian tribe. Those circumstances are more than sufficient to give rise to a "substantial possibility" that the 3500 acres are Indian trust lands. By contrast, in *Spaeth* there was no such formal determination that the lands in question were held in trust for the benefit of Indians (see 757 F.2d at 942-946).

2. The court of appeals also correctly held that the district court does not have jurisdiction over this case under the McCarran Amendment, 43 U.S.C. 666, which consents to the joining of the United States as a defendant in any suit "for the adjudication of rights to the use of water of a river system or other source * * *." This Court made clear in *Dugan* v. *Rank*, 372 U.S. 609, 617-618 (1963), that the McCarran Amendment waives the United States' sovereign immunity only to suits to adjudicate the rights of *all* claimants on a stream; this suit, however, "is not such a general adjudication" (Pet. App. 11a (footnote omitted)).

Petitioners' contention (Pet. 27) that this suit is a "partial" water rights adjudication therefore is beside the point. In fact, this obviously is not a water rights adjudication at all. The only relevant adjudication of water rights is in this Court, in *Arizona* v. *California*. This suit, by contrast, directly challenges only the Secretary's boundary determination and the nature of the United States' title to *land*; for this reason, even if petitioners were to prevail on the merits, the judgment of the district court would not quantify the parties' respective water rights.[7]

3. Finally, petitioners are clearly wrong in asserting (Pet. 14-18) that by intervening in *Arizona* v. *California*, the United States waived its sovereign immunity to this separate suit. See Pet. App. 8a. When the Court in *Arizona* v. *California II* referred to this suit as a possible forum for the final determation of the boundary dispute, the Court acknowledged that the United States had moved to dismiss

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[7] Petitioners err in relying (Pet. 28) on *South Delta Water Agency* v. *United States Dep't of Interior*, 767 F.2d 531, 540-541 (9th Cir. 1985). There, the Ninth Circuit held that sovereign immunity did not bar an action to require the Secretary of the Interior to operate certain facilities of the Central Valley Project in California in accordance with state law and in a manner that did not interfere with the rights of other water users. The plaintiffs in *South Delta* did not challenge the United States' title to land or water rights, and that suit (unlike this one) was not governed by the QTA (see *id.* at 541-543). Similarly, in *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts* v. *United States*, 832 F.2d 1127 (9th Cir. 1987), also cited by petitioners (Pet. 28), the court disavowed any purpose to adjudicate water rights. 832 F.2d at 1130. Rather, that case involved a challenge to the Secretary's operation of a project to protect Indian fishery interests. The *Joint Board* decision therefore does not support petitioners' efforts to have the courts below resolve questions of title to land. But even if there were some inconsistency between the Ninth Circuit's decision in this case and its decisions in *South Delta* and *Joint Board*, that intra-circuit conflict would not warrant review by this Court.

the complaint on the basis of sovereign immunity. And the Court contemplated that the sovereign immunity issue would be litigated in the ordinary course of trial and appellate proceedings. 460 U.S. at 638. The Court in no way suggested that the United States' immunity to this suit had *already* been waived, nothwithstanding any statutory provision retaining the United States' immunity to suit, by virtue of the United States' participation in *Arizona* v. *California*.

Moreover, petitioners candidly admit (Pet. 15) that they have found no case to support their novel theory of waiver, and that theory in fact conflicts with the most basic principles of sovereign immunity. As the court of appeals properly held, waivers of immunity must be "unequivocally expressed" and construed "strictly and narrowly" (Pet. App. 7a). See *Block* v. *North Dakota*, 461 U.S. at 287. Thus, when the United States files suit, it does not waive immunity to counterclaims—even in the same suit, much less in an entirely separate action—that are beyond the scope of the United States' initial claim (Pet. App. 7a). See *United States* v. *Shaw*, 309 U.S. 495 (1940); cf. *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939) ("Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States.").[8]

[8] As petitioners recognize, none of the cases upon which they rely (Pet. 15 & n.8) is similar to this case. *United States* v. *The Thekla*, 266 U.S. 328 (1924); *United States* v. *Martin*, 267 F.2d 764 (10th Cir. 1959); and *United States* v. *Taunah*, 730 F.2d 1360 (10th Cir. 1984), all involved limited circumstances in which the United States may be susceptible to a counterclaim in the *same* action. In *Jones* v. *Watts*, 142 F.2d 575 (5th Cir. 1944), the court held that although a party could assert a counterclaim against the United States in a suit brought by the United States, it could not seek the identical relief in a separate lawsuit. See *Fidelity & Casualty Co.* v. *Reserve Insurance Co.*, 596 F.2d 914, 916-918 (9th Cir. 1979).

Petitioners' citation (Pet. 15) to *Minnesota* v. *United States*, 305 U.S. 382 (1939), is inapposite. There, the Court held that when a case is removed from state court to federal court, the federal court does not have jurisdiction over the case if the state court lacked jurisdiction, even if the federal court would have had jurisdiction if the suit had been filed there in the first instance. *Id.* at 388-389. This result has since been overruled by statute. Judicial Improvement Act of 1985, Pub. L. No. 99-336, § 3(a), 100 Stat. 637 (to be codified at 28 U.S.C. 1441(e)).

Here, although the measure of the water right reserved by the United States on behalf of the Tribe is determined in *Arizona* v. *California* by the number of practicably irrigable acres within the Reservation, the district court litigation initiated by the water-agency petitioners goes far beyond establishing a basis for the quantification of water rights. In this suit, petitioners challenge the Secretary's statutory authority under 43 U.S.C. 772 to correct the boundary of the Fort Mojave Indian Reservation and, as a consequence, to adjust the boundary between lands held in trust for the benefit of an Indian Tribe and other federal lands. The court of appeals therefore properly characterized this lawsuit as a challenge to "the Secretary's authority and procedures [to] establish[ ] Indian reservation boundaries" (Pet. App. 8a (footnote omitted)), and thereby to ascertain the trust status of *land* owned by the United States. Unlike *Arizona* v. *California*, it is not limited to, and does not even directly concern, the determination of *water* rights.

4. The decision of the court of appeals does not adjudicate the merits of the Secretary's 1974 order. The court merely held that petitioners cannot challenge that order in this suit against the Secretary in district court. As the Court made clear in *Arizona* v. *California II*, the Secretary's orders correcting the boundaries of the three Reservations cannot result in an increase in the reserved water rights for those

Reservations unless petitioners are first given an opportunity to challenge those orders. 460 U.S. at 636. Because petitioners are barred by sovereign immunity from challenging the orders in this case, they of course must be afforded a suitable opportunity to do so in another forum—*e.g.*, in this Court, following a renewed motion by the United States to amend the decree in *Arizona* v. *California,* or, if appropriate, in other proceedings initiated for that purpose. Now that the court of appeals has disposed of this case on jurisdictional grounds—a disposition that this Court recognized was possible in 1983—the United States will consider what other steps should be taken to bring about a prompt resolution of these boundary issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
JAMES L. BYRNES
Acting Assistant Attorney General
EDWARD J. SHAWAKER
SARAH P. ROBINSON
Attorneys

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Supreme Court of the United States

October Term, 1987

THE STATE OF CALIFORNIA, THE STATE OF ARIZONA, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, AND THE COACHELLA VALLEY WATER DISTRICT,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DALE T. WHITE
WHITEING, THOMPSON & WHITE
1050 Walnut, Suite 212
Boulder, CO 80302
Attorney for the Fort Mojave Indian Tribe

WILLIAM E. STRICKLAND
STRICKLAND & ALTAFFER
700 Transamerica Bldg.
Tucson, AZ 85701
Attorney for the Quechan Indian Tribe

SCOTT B. MCELROY
Counsel of Record
GREENE, MEYER & MCELROY
1007 Pearl Street, Suite 240
Boulder, CO 80302
303/442-2021
Attorney for the Colorado River Indian Tribes

March 17, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. May potentially affected water users invoke the Administrative Procedure Act, 5 U.S.C. § 702, to overturn three decisions by the Secretary of the Interior to hold lands in trust for the benefit of three Indian Tribes, in light of Congress' express refusal in the Quiet Title Act, 28 U.S.C. § 2409a, to waive the sovereign immunuity of the United States in suits to adjudicate disputed title to "trust or restricted Indian lands" and the APA's express provision that it does not authorize suit if "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"?

2. Does the intervention of the United States in *Arizona v. California,* an original action in this Court to adjudicate rights to water from the Colorado River, waive the United States' immunity to suit in a separate federal district court action challenging three decisions of the Secretary of the Interior to hold land in trust for the benefit of three Indian Tribes?

3. Does the McCarran Amendment, 43 U.S.C. § 666, subject the United States to suit in federal district court to determine the validity of decisions by the Secretary of the Interior concerning the proper location of the boundaries of three Indian Reservations when the adjudication of the tribal water rights is pending before this Court in an original action?

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STATEMENT OF THE CASE

At issue in this case are portions of the boundaries of the Fort Mojave Indian Reservation, governed by the Fort Mojave Indian Tribe; the Colorado River Indian Reservation, governed by the Colorado River Indian Tribes; and the Fort Yuma Indian Reservation, governed by the Quechan Indian Tribe. On these three Reservations, the location of the boundaries determines whether the lands in question will be administered by the Secretary of the Interior as public lands or held in trust for the benefit of the Indian Tribes who inhabit and govern the Reservations.

The boundary issues were raised but left unresolved in the ongoing original action, *Arizona v. California*, 373 U.S. 564 (1963) (*Arizona v. California I*); 460 U.S. 605 (1983) (*Arizona v. California II*). Despite the relationship between this action and the proceedings in *Arizona v. California*, the present action, as the Ninth Circuit recognized, is not an ancillary proceeding that derives its jurisdiction from *Arizona v. California*. When this Court last considered the boundary issues, this litigation was pending and the Court referred to it as a possible forum for resolving the boundary issues. It was recognized, however, that jurisdictional and standing defenses lurked in the background. Those jurisdictional defenses have emerged as insurmountable barriers to petitioners' action.

A. Background of Proceedings in the District Court.

In their prayer for relief in the complaint below, the petitioners, the Metropolitan Water District of Southern California ("MWD") and the Coachella Valley Water

District (Coachella),[1] ask (1) that the three orders of the Secretary of the Interior determining the boundaries of the Reservations "be declared in error and void," (2) that the boundaries of the Reservations be determined and declared, and (3) for the issuance of an "injunction requiring the Secretary to set aside the [orders] at issue and prohibiting the use of Colorado River water on lands found to be outside the boundaries of the [Reservations]." *See* Second Amended Complaint at 21-23, ordered filed on October 31, 1983. In response to cross-motions for summary judgment regarding the disputed portion of the boundary of the Hay and Wood Reserve on the Fort Mojave Indian Reservation, the district court ordered that the Secretary's order was "void," App. at 26a.

The district court vacated the Secretary's order on two separate grounds. It found that the Secretary exceeded his statutory authority under the federal resurvey statute, 43 U.S.C. § 772, since in the district court's view, MWD's and Coachella's contractual rights to the delivery of water from the Colorado River entitled them to be treated as bona fide "claimants' adversely affected by the resurvey. App. at 20a. The district court also vacated the order on due process grounds, finding that because MWD and Coachella did not receive notice and a hearing before the Secretary issued his order, the order was void *ab initio*. App. at 23a. Finally, the court held,

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[1]Although named as defendants in the district court, the States of Arizona and California have joined in the petition asking the Court to review the decision of the Ninth Circuit holding that the suit is barred by the United States' immunity.

under 5 U.S.C. § 706(2)(D), that it was authorized to determine the boundary issue *de novo*. App. at 20a, 23a, 26a. The Tribes and the United States appealed pursuant to 28 U.S.C. § 1292(b), challenging the jurisdiction of the district court, the holding that the Secretary's order was void, and the decision by the district court that having vacated the Secretary's order, it would decide the boundary issue *de novo*.[2]

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[2]Although the district court's order related only to the Secretary's decision regarding the boundary of the Fort Mojave Reservation, the three Tribes jointly sought an interlocutory appeal and filed joint briefs in the Court of Appeals.

The Secretary's order at Fort Mojave, issued on June 3, 1974, directed a resurvey of the Hay and Wood portion of the Reservation. The order resolved a long-standing dispute within the Interior Department as to the correct location of the western boundary of the Reserve. The Secretary resolved the conflict by deciding that the correct location of the Reserve was according to the courses, distances and acreage calls in the legal description, making the Reserve the full 9,114.81 acres as stated in the 1870 Executive Order.

The boundary dispute at the Colorado River Indian Reservation involves interpretation of an Executive Order issued on May 15, 1876. The 1876 Executive Order modified the Reservation boundaries, which were originally established by the Act of March 3, 1865, 13 Stat. 541, 559, by describing one of the boundaries as the "west bank of the Colorado River." The dispute concerns whether the boundary along the west bank is a fixed line or a moving line subject to the rules of accretion and avulsion. On January 17, 1969, the Secretary, relying upon an opinion from the Solicitor, issued an order directing that approximately the northerly two-thirds of the disputed boundary was to follow a fixed line.

The Fort Yuma Reservation boundary dispute centers on interpretation of a cession agreement entered into between the Quechan Tribe and the United States and ratified by statute in 1894, 28 Stat. 332. The 1893 agreement provided for the al-

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In its *per curiam* decision, the Ninth Circuit addressed only the issue of whether the district court had jurisdiction. The court noted that the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), "does not waive immunity to any claims which are expressly or impliedly forbidden by any other statute that grants consent to suit." App. at 9a. The Court of Appeals concluded that the Quiet Title Act, 28 U.S.C. § 2409a ("QTA"), was such a statute and did not waive the immunity of the United States in a suit such as this in which "the United States claims an interest in real property based upon that property's status as trust or restricted Indian lands." App. at 9a. The Circuit Court also noted "the additional jurisdictional problem of absence of a case or controversy." App. at 6a, n. 3. The court reasoned that the petitioners' water rights were not "threatened" in light of this Court's holding in *Arizona v. California II*, that the Secretary's orders standing alone were not sufficiently final to warrant an adjustment to the tribal allocations. *Id.* The Ninth Circuit also rejected the contention of the petitioners that the McCarran Amendment, 43 U.S.C. § 666, could be viewed as a waiver of the United States' sovereign immunity in litigation which, at most, addressed only a preliminary issue to the determination of the relative rights of cer-

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lotment of irrigable lands, the sale of surplus irrigable lands under certain prescribed conditions, the holding of the proceeds in trust for the Tribe and the opening of non-irrigable acres to settlement under the general laws of the United States. On December 20, 1978, the Secretary issued an order declaring the 1893 cession agreement and the 1894 ratifying statute of no effect, due to the failure of the United States to fulfill the conditions of the 1893 agreement.

tain of the competing claimants to water from the Colorado River. App. at 11a.

B. Treatment of the Boundaries in Arizona v. California

As petitioners so vigorously argue, the *raison d'etre* of this case is *Arizona v. California I*, and the efforts of the United States and the Tribes to obtain additional allocations for the lands now recognized by the Secretary as part of the Reservations. *See Arizona v. California II*, 460 U.S. at 636-41. The present case was filed in response to the now rejected recommendation of Special Master Tuttle in *Arizona v. California II* that in the absence of any challenge to the Secretary's orders, the Court should treat the boundaries as "finally determined" within the meaning of its 1964 decree and increase the tribal water allocations in recognition of the lands now treated as part of the Reservations.[3] *See* Memorandum and Report on Preliminary Issues of Special Master Elbert P. Tuttle (August 28, 1979), *Arizona v. California* (No. 8, Orig., October Term, 1978) at 44.

The instant litigation was the subject of considerable discussion before this Court in *Arizona v. California II*. As pointed out by petitioners, the controversies at Fort Mojave and Colorado River initially arose in *Arizona v. California I*, but the Court expressly declined to resolve the boundary issues. 373 U.S. at 601; *Decree*, 376 U.S. at

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[3]Article IV, D(5) of the 1964 Decree in *Arizona v. California I* made the allocations to the Tribes "subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 376 U.S. at 345.

345. Subsequently, the Secretary's orders were issued and the Tribes and the United States moved this Court to increase the tribal water allocations to provide water for use on the lands now acknowledged by the Secretary to be part of the Reservations. *See, e.g.*, Motion of the United States For Modification of Decree and Supplementary Memorandum, *Arizona v. California* (No. 8, Orig., October Term, 1978). The Court appointed a special master to make recommendations on the issue. 439 U.S. 419, 436 (1979).

Consistent with their motions for modification, the United States and the Tribes urged Special Master Tuttle to accept the Secretary's orders as final for purposes of the 1964 Decree. MWD asked the Special Master to adjudicate the boundary issues. In response, Special Master Tuttle refused to review the disputed boundaries and decided that the reservation boundaries established by the Secretary's orders had been finally determined within the meaning of the Court's earlier decree. 460 U.S. at 636-37. Before the Supreme Court, the United States and the Tribes again contended that the Secretary's orders were sufficiently final to meet the terms of the Court's earlier decree. 460 U.S. at 634. MWD and Coachella insisted that the Special Master erred in refusing to adjudicate the boundary issues and advised the Court that it was "an appropriate, indeed, perhaps the only forum in which such claims might be resolved." Exceptions of the California Agencies to the Report of Special Master Elbert P. Tuttle; Brief of Said Parties in Support of Exception, May 1982 at 18 (*Arizona v. California*, No. 8 Orig.); *see also* 460 U.S. at 638. This Court rejected

Special Master Tuttle's recommendation to increase the tribal allocations to account for the boundary lands. The Court also rejected the request by MWD and others that it decide the boundaries issues, indicating its preference that "if at all possible," the boundary issues be resolved in the present case or elsewhere. 460 U.S. at 638.

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REASONS FOR DENYING THE WRIT

This case involves petitioners' request to have the district court compel the Secretary of the Interior, despite his considered opinion to the contrary, to treat the lands in question as public lands in which the affected Indian Tribes have absolutely no interest. Despite the connection between this case and *Arizona v. California*, the critical issue presented by the petition for review is whether the Ninth Circuit correctly held that Congress has not granted the lower courts jurisdiction to hear such matters.

Petitioners contend that MWD's and Coachella's status as contract holders entitled to the delivery of water from the Colorado River peremits them to challenge the tribal interests in these lands, even though parties claiming an interest in the land itself are admittedly foreclosed from such a challenge. In order to avoid the problems with this case, petitioners rely on the Court's obvious desire in *Arizona v. California* to avoid the resolution of the Reservation boundary disputes. In furtherance of their arguments, petitioners repeatedly mischaracterize this

case as a "partial" water adjudication and the relief which they seek as "limited."

But there should be no confusion about the far-reaching scope of relief sought by petitioners. Their complaint seeks an order which will effectively divest the Tribes of any interest in the questioned lands and compel the Secretary to administer such lands as public lands rather than Indian lands. The only issue presented by the decision of the Ninth Circuit is whether the United States has waived its immunity to suit in district court to adjudicate these matters. The Court of Appeals in its *per curiam* decision recognized the drastic remedy sought by the petitioners and was not confused by the petitioners' misleading statements about the limited nature of the litigation below.

In its decision, the Circuit Court correctly followed the guidance provided in *Block v. North Dakota*, 461 U.S. 273 (1983), and *United States v. Mottaz*, 476 U.S. 834 (1986), that the APA does not waive the immunity of the United States in lawsuits such as this which are foreclosed under the QTA. The QTA expressly provides that the United States is not subject to suits over questions of title to trust or restricted lands and the APA by its own terms cannot be used to avoid that limitation. Likewise, the Ninth Circuit was correct in holding that "An application to the Supreme Court under a continuing decree for a reallocation of water rights cannot be viewed, under any stretch of the imagination, as consent by the Secretary to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation

boundaries." App. at 8(a). Finally, longstanding precedent demonstrates that the McCarran Amendment was never intended to subject the United States to a suit such as this which, at most, addresses a small portion of the complex issue of adjudicating water rights from the Colorado River.

In short, the decision below was correct in that the United States' immunity protects the critical tribal interests under assault here from suit. Accordingly, there is no reason to grant the writ in this case.

I. THE NINTH CIRCUIT CORRECTLY APPLIED THE QUIET TITLE ACT'S INDIAN LANDS EXCEPTION TO MWD'S BOUNDARY CHALLENGE.

The QTA expressly waives the United States' sovereign immunity in civil actions "to adjudicate a disputed title to real property in which the United States claims an interest," subject to certain exceptions. Excluded from the waiver are actions challenging title to lands claimed by the United States as "trust or restricted Indian lands" and actions to adjudicate water rights that might be brought under the McCarran Amendment, 43 U.S.C. § 666.

The Court has twice examined the QTA in recent years. *Block v. North Dakota, supra; United States v. Mottaz, supra.* In *Block*, the Court granted certiorari to resolve the issues of "whether Congress intended the QTA to provide the exclusive procedure by which a claimant can judicially challenge the title of the United States to real property" and whether the QTA's 12-year statute of limitations applies to actions brought by states. 461 U.S. at 276-77. Both issues were resolved in the affirma-

tive. After an extensive review of the evolution and intent of the QTA, the Court held:

> [C]ongress intended the QTA to provide the *exclusive means* by which adverse claimants could challenge the United States title to real property.

461 U.S. at 286 (footnote omitted) (emphasis added). North Dakota could not circumvent the "carefully-crafted provisions of the QTA" by use of an "officers suit" or through the waiver of immunity found in the APA at 5 U.S.C. § 702. The Court summarized the relationship between the QTA and the APA as follows:

> That statute [5 U.S.C. § 702] waived federal sovereign immunity for suits against federal offers in which the plaintiff seeks relief other than money damages, but it specifically confers no 'authority to grant relief if any other statute that grants consent to suit expressly or *impliedly forbids* the relief which is sought.' The QTA is such an 'other statute, because, if a suit is untimely under the QTA, the QTA expressly 'forbids the relief' which would be sought under § 702.

461 U.S. at 286, n. 22 (emphasis added).

Three years later, in *United States v. Mottaz*, the Court once again granted certiorari to interpret the QTA. The Eighth Circuit had concluded that certain Indian allottees could avoid the QTA's 12-year statute of limitations by suing the United States under the general jurisdictional provisions of 28 U.S.C. § 2401(a). At issue were lands in the Chippewa National Forest which the allottees claimed should be held in trust for their benefit. In reversing the Court of Appeals, the Court reiterated its holding in *Block* that the QTA was the only method available to challenge the United States' title to real property.

The Court provided considerable guidance in interpreting two of the central provisions of the QTA: what constitutes a "civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest" and when does the exception for Indian lands apply. The Court first emphasized that it is the nature of the relief being sought, not its characterization by the plaintiff, that determines the applicability of the QTA. 476 U.S. at 842. On the issue of the Indian lands exception, the Court stated that it applies to "suit[s] by third parties challenging the United States' title to lands held in trust for Indians." *Id.*

> Thus, when the United States claims an interest in the real property based upon that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity.

476 U.S. at 843 (footnote omitted). The footnote to that statement further emphasized that the purpose of this exception which had been recommended by the Solicitor of the Department of the Interior was to protect and preserve Indian lands. 476 U.S. at 843, n. 6.

The result is that this Court has already addressed the meaning and intent of the QTA and the Ninth Circuit's decision is squarely consistent with the Court's interpretation.

A. MWD's Action is Governed by the QTA.

The Ninth Circuit was correct in holding that this suit cannot proceed under the APA in light of the restrictions in the QTA. The APA as noted by the Court in *Block* does not provide consent to suit where another statute consent-

ing to suit "expressly or impliedly" prohibits the relief sought. *Block, supra,* 461 U.S. at 286, n. 2.

The QTA applies to all civil actions seeking to "adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a. In this case, the district court was asked to determine the title to the disputed lands by ascertaining the location of the three questioned Reservation boundaries. The complaint seeks a "determination and declaration as to the proper boundaries" so as to reduce the size of the Indian Reservations. At Fort Mojave, the Reservation would be reduced by some 3,500 acres. *Arizona v. California II,* 460 U.S. at 632. At Fort Yuma, some 25,000 acres would be lost. *Id.* at 633. And at the Colorado Indian Reservation, some 4,400 acres of reservation lands would be severed. *Id.* at 631. Although petitioners' interest in these lands originates with the potential impact on the amounts of water available to satisfy MWD's and Coachella's contracts, this action nevertheless plainly seeks to adjudicate the Tribes' title.[4]

As the Court of Appeals recognized, the QTA applies even though MWD and Coachella were not suing to recover title in their own name. App. 9a-10a. Congress described the broad purpose of the QTA as "to permit the United States to be named as a party in a civil action brought

[4]In *Arizona v. California I,* this Court previously refused to award water rights for non-trust lands within the boundaries of the Fort Mojave Indian Reservation. *Decree,* 376 U.S. at 345. If petitioners' objective is to address issues related to the determination of the Tribes' water rights, they therefore must challenge the trust status or underlying title of the lands rather than the inclusion of the lands in the Reservation for jurisdictional purposes.

by *any* person to quiet title to land claimed by the United States." S. Rep. 575, 92nd Cong., 1st Sess. 1 (1971) (emphasis added). The concern at the time was to remove sovereign immunity as a barrier to "[s]uits to quiet title or remove a cloud on title" to lands claimed by the United States. S. Rep. 575, *supra* at 5. It would be inconsistent with this broad waiver to limit the QTA's applicability only to parties seeking to recover title in their own names.

Moreover, to read the QTA in such a manner would effectively nullify the retained immunity of the United States for lands claimed as "trust or restricted Indian lands." 28 U.S.C. § 2409a. The Eleventh Circuit recognized that consequence in *State of Florida v. U.S. Dept. of Interior,* 768 F.2d 1248 (11th Cir. 1985).

> Although technically the suit in the instant case is not one to quiet title, we conclude that Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here. By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes.

768 F.2d at 1254.[*] The court found that it would be "anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands." 768 F.2d at 1254-55.

Nor does it matter that, even if successful, this litigation would not result in a total divestment of the United States' title since the lands would become public lands managed by the Bureau of Land Management. The fact remains that the United States would be divested of its

title to these lands as Indian trust lands held for the exclusive use of the three Indian Tribes.

In *United States v. Mottaz*, this Court applied the QTA under similar circumstances. There, the plaintiff was an Indian allottee seeking to recover her allotment which was now part of Chippewa National Forest. Under her theory, the land had always been held in trust for her by the United States. Granting plaintiff's relief would not have divested the United States of its title since it would be Indian trust lands instead of National Forest lands. Yet, this Court looked to the QTA to define the extent to which the United States had waived its immunity to suit.[5]

The Ninth Circuit did not, as petitioners suggest, misconstrue the nature of this action. MWD and Coachella are attempting to interfere with the Secretary's responsibilities to resurvey the boundaries of the Reservations. Through federal statutes, 25 U.S.C. § 176 and 43 U.S.C. § 772, Congress has delegated to the Secretary the "discretion" to resurvey Indian Reservation boundaries, including the interpretation of relevant treaties and executive orders. (MWD concedes that it cannot

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[5]Contrary to petitioners' contentions, the Ninth Circuit's decision will not frustrate resolution of important federal-state-Indian jurisdictional issues. Pet. at 21-22. The jurisdictional cases cited by petitioners do not seek to determine the title to the lands held by the United States for the benefit of the affected tribes, but rather involve determination of reservation boundaries in order to ascertain the jurisdictional responsibilities of the interested tribes, states and the United States. Here, in contrast, the issue involves the title to the land. *See* n. 5, *supra*.

challenge this policy decision.) Petitioners' claim that this case only challenges "the Secretary's attempt to give the added lands a retroactive earlier water priority by 'reinterpreting' " the relevant executive orders, Pet. at 22-23, does not mitigate the interference with the Secretary's fiduciary responsibilities. No matter how vigorously petitioners claim that this case is a water allocation suit, the fact remains that tribal title to the land is at stake.

B. The Indian Lands Exception Applies.

The Ninth Circuit also correctly applied the Indian lands exception of the QTA to MWD's action. As interpreted by this Court, the exception retains the United States' immunity in actions "by third parties *challenging the United States' title to lands held in trust for Indians.*" *United States v. Mottaz, supra*, 476 U.S. at 842 (emphasis added). As stated by the Court, "when the United States *claims an interest* in the real property based upon that property's status as trust or restricted Indian lands," the QTA does not waive the Government's immunity. *Id.* at 843 (emphasis added). Plainly, the lands in question here are claimed by the United States "based upon their status as trust or restricted Indian lands." *Id.*[6] This fact justified the Court of Appeals' application of the QTA's Indian lands exception and the dismissal of this lawsuit.[7]

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[6]This is expressly acknowledged by MWD and Coachella in their Second Amended Complaint, ordered filed on October 31, 1983, at p. 4.

[7]The Ninth Circuit's reasoning is consistent with its earlier decision in *Wildman v. United States*, 827 F.2d 1306 (9th Cir.

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Petitioners argue that the Court of Appeals should have paid heed to the Eighth Circuit's interpretation of the Indian lands exception in *Spaeth v. United States*, 757 F.2d 937 (8th Cir. 1985), and required the United States to establish that its claim to the Indian lands is "substantial" before the QTA exception applies. 757 F.2d at 943. The *Spaeth* decision is factually distinguishable from the present action and should not be applied here. Moreover, its legal reasoning does not withstand scrutiny.

Prior to enactment of the QTA, sovereign immunity precluded jurisdiction over suits where the United States claimed an interest in lands as trustee for Indians. *See Minnesota v. United States*, 305 U.S. 382 (1939). In the Indian lands exception, Congress intended to continue this protection for Indian trust land. Nothing in the legislative history of the QTA indicates otherwise. *See Block v. North Dakota*, 461 U.S. at 280 (prior to the QTA, persons "asserting title to land *claimed* by the United States had only limited means of obtaining a resolution of the title dispute. . . .") (emphasis added). To require a substantial claim would defeat the very purpose of the Indian

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1987), which held that a "colorable claim" by the United States that the lands are Indian lands is sufficient to invoke the exception. The court in *Wildman* rejected the contention that the United States has the burden of showing that the claim is substantial:

> Nothing in the statute [the QTA] suggests that the United States was to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the government declares that it is the trustee for Indians . . . .

827 F.2d at 1309.

lands exception, *i.e.*, to preserve the United States' immunity in cases disputing the trust status of Indian land. If the United States must prove that its title claim is substantial before immunity applies, the immunity preserved is rendered nugatory.

The only authority cited in *Spaeth* requiring the United States' claim to be substantial is an Arizona district court case, *Newman v. United States*, 504 F.Supp. 1176 (D. Ariz. 1981). None of the cases relied upon by the court in *Newman* reached the issue of the substantiality of the United States' claim. Nor did these courts devise pretrial procedures for determining that issue. Indeed, prior to the QTA, even where the government's claim was based on a decision characterized as "purely arbitrary," the suit was nevertheless dismissed on sovereign immunity grounds. *New Mexico v. Lane*, 243 U.S. 53, 56 (1917), cited in *Newman v. United States*, 504 F.Supp. at 1179.

The Court of Appeals was further justified in not following *Spaeth*, given its unique factual situation which is not present here. *Spaeth* involved numerous challenges to land once held by individual Indian allottees. The non-Indian plaintiffs had been in possession of the disputed land for years, but their title was being threatened due to a drastic reversal in federal policy regarding the estates of some former allottees. After citing *Newman v. United States* for the requirement of substantiality, the Eighth Circuit concluded, "we note that our analysis of the jurisdictional issues is affected by the extremely unusual facts of this case." 757 F.2d at 945. In contrast, the plaintiffs here are assured by this Court's decision in *Arizona v. California II* of judicial review of the Secretary's decisions before their interests can be affected. Thus, unlike

Spaeth, there is no danger that unjustified Secretarial actions will injure parties with no judicial recourse.

As a result, the Court of Appeals was correct in disregarding *Spaeth*. In the present circumstances, there is no authority which warrants the imposition of the requirement that the United States demonstrate that it has a substantial claim to the lands in question prior to invoking its immunity.

C. Conclusion

The Ninth Circuit's decision demonstrates plainly that it well understood the teachings of this Court in *Mottaz* and *Block* regarding the interaction between the APA and the QTA and the application of those statutes to Indian lands. The unique factual circumstances of this case do not require a re-evaluation of the guidance previously provided by the Court. As a result, review of the Court of Appeals' decision is not warranted.

II. THE DECISION BY THE COURT OF APPEALS IS CONSISTENT WITH ARIZONA v. CALIFORNIA.

A. The United States' Waiver of its Sovereign Immunity in an Original Action did not Authorize this Suit to Challenge the Trust Status of Reservation Lands.

The petitioners also contend that the United States' assertion of reserved water rights in *Arizona v. California* subjects the United States to litigation in the district court challenging the right of the Secretary of the Interior to hold the disputed lands in trust for the three Tribes and to administer those lands as part of the Reservations. As

petitioners admit, Pet. at 15, this remarkable view has never been endorsed by any court.

Petitioners take this novel stance despite the assurances of the Court in *Arizona v. California II* that their ability to use water from the Colorado River will not be jeopardized without the Court's scrutiny of the underlying predicates for the award of additional water to the Tribes. As a result, this is not the usual situation in which sovereign immunity is questioned because it leaves an aggrieved entity without a forum in which to obtain relief. To the contrary, petitioners' interests are completely protected by the existing decree in *Arizona v. California* and will not be affected in the absence of review in this Court or elsewhere. At any rate, there is no justification for petitioners' strained argument that the Court of Appeals erred in failing to find that the United States waived its immunity to suit in district court by intervening in *Arizona v. California*.

The rules governing waiver of sovereign immunity are well-established. The United States is immune from suit unless Congress has waived such immunity. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *United States v. Shaw*, 309 U.S. 495, 500-02 (1940). "[T]he terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, *supra*, 312 U.S. 584, 586. "Ever when suits are authorized they must be brought only in designated courts." *United States v. Shaw*, *supra*, 309 U.S. 495, 501; *see generally Block v. North Dakota*, *supra*, 461 U.S. at 284-85.

The Court's perspective on sovereign immunity in *Larson v. Domestic & Foreign Corporation*, 337 U.S. 682,

704 (1949), is noteworthy. *Larson* involved a suit against the head of the War Assets Administration to prohibit the sale of coal by the administrator to anyone but the plaintiff. The Court stated:

> There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, "The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief
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> . . . .
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> There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions.

337 U.S. at 704. Here, the rights of the petitioners are amply protected from interference by this Court's Decree in *Arizona v. California*. Before the tribal rights can be increased, the question of whether the Secretary's orders warrant the award of an early priority date for the affected lands must be addressed by this Court. Petitioners' rights, therefore, "are protected against governmental action" and no need exists for the Secretary to be "stopped in [his] tracks" from administering the lands in question in furtherance of his trust responsibilities.

In support of their novel argument, petitioners cite *United States v. The Thekla*, 266 U.S. 328 (1924), and

Minnesota v. United States, supra[8] in a feeble effort to draw an analogy between their action and a permissive counterclaim. Those cases stand for the narrow proposition that when the United States initiates a lawsuit, defendants may seek recoupment or setoff against the Government, so long as the claim relates to the subject matter. But as noted in *United States v. Penn*, 632 F. Supp. 691, 693 (D.V.I. 1986), cited by petitioners, the relief sought cannot "exceed" or be "different in kind" than that sought by the United States.[9]

In this case, the relief petitioners seek is considerably different than the water rights at stake in *Arizona v. California*. In *Arizona v. California*, the validity of the Secretary's decision, in effect, determines whether the United States is entitled to additional water rights for use by the

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[8]The citation to *Minnesota v. United States, supra*, is particularly surprising. There the Court held that where a state court lacks jurisdiction, removal to federal court will not cure that defect even if the federal court otherwise would have jurisdiction. The Court stated:

> And it rests with Congress to determine not only whether the United States may sue, *but in what courts the suit may be brought* . . . . Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States.

Id. at 388-89 (citations omitted) (emphasis added). The thrust of petitioners' argument is that by intervening in *Arizona v. California*, the Solicitor General conveyed authority to the district court to adjudicate the issues in this case.

[9]Of course, this action is not a counterclaim. The United States intervened as a plaintiff in *Arizona v. California*, an entirely separate cause of action. Assuming *arguendo* that that intervention constituted a waiver of immunity, then the adjudication of issues in *Arizona v. California* is not barred.

Tribes with the same priority date as the adjacent Reservation lands. Thus, the concern of the petitioners is that water rights for the disputed lands not receive the early priority date. If the United States and the Tribes are unsuccessful, and petitioners succeed, the result would be that petitioner's water rights would be unaffected. Here, the petitioners affirmatively seek to preclude the Secretary of the Interior from administering the lands as trust lands held for the benefit of the Tribes—a much different result.[10]

In these circumstances, *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940) provides useful guidance. In that case, the Court refused to permit a cross-claim in the Missouri courts against the Choc-

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[10]Notably, the lands in question are of considerable importance to the Tribes, whatever the status of the accompanying water rights. For example, at Colorado River the lands in dispute are adjacent to the River and are valuable for recreational and other purposes. The United States has already obtained final judgments quieting title in the Tribes for various parcels considered as part of the Reservation under the Secretary's order. *Arizona v. California II, supra,* 460 U.S. at 631.

As noted by the Ninth Circuit in *Wildman v. United States* involving Fort Mojave reservation lands:

> The 52.5 million acres held in trust by the United States for the Indians are the tribes' 'single most important economic resource.' F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 471. The interests held by the tribes as cestuis que trust are 'a unique form of property right in the American legal system, shaped by the federal trust over tribal land and statutory restraints against alienation.' *Id.* at 472. The land is the essential base of tribal culture, development, and society. *Id.* at 509. As trustee, the United States properly acts with the jealousy of a fiduciary to protect this base.

823 F.2d at 1309.

taw and Chickasaw Nations. By statute, Congress had allowed cross-suits against the Indian Nations, but only in "any United States court in the Indian Territory." Act of April 26, 1906, § 18, 34 Stat. 137, 144, 148. Even though the United States brought suit against the defendants in Missouri, the Court refused to allow the cross-claim in excess of the original claim in that court. The Court's reasoning is equally applicable here:

> The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian Nations with their unusual governmental organization and peculiar problems.
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> It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.

United States v. United States Fidelity and Guaranty Co., supra, 309 U.S. at 506.

In conclusion, no precedent exists for the concept that when the United States enters into litigation in one forum, it waives its immunity to suit in other forums on related issues. Indeed, *United States v. United States Fidelity and Guaranty Co.* suggests precisely the opposite result.

B. This Court did not Direct the Resolution of the Title Claims in the District Court.

Petitioners also argue strenuously that this Court in *Arizona v. California II* directed the adjudication of the so-called boundary issues in the district court. Pet. at 17-18. The Tribes do not read the statement quoted from *Arizona v. California II*, 460 U.S. at 639, to mandate such a result in the absence of an adequate jurisdictional basis in the district court. As we read the Court's statement—contrary to petitioners' assertions—it was not meant to resolve the then-outstanding issues over the jurisdiction of the district court in this case. The statement was in response to the urgings of MWD and others that the Court decide the boundary issues and indicated the Court's preference for judicial review of the boundary claims in the district court or elsewhere. The Court, however, expressly acknowledged that it would revisit the question of whether it should address the boundary issues "if any of these grounds for dismissal are sustained." *Arizona v. California II*, 460 U.S. at 638.[11]

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[11]Petitioners also refer to the statements of Mr. Claiborne appearing for the United States in *Arizona v. California II* that he "disowned" the then pending motion to dismiss this case in the district court, claiming that the statement was an abandonment of the United States' jurisdictional defenses in this litigation. The extract quoted by the petitioners and the gloss which they ascribe to it, is misleading. Plainly, the Court did not understand Mr. Claiborne to say that the United States was abandoning its jurisdictional defenses in this case, but rather understood that he was merely indicating that he had not filed the motion to dismiss in this case. The full text of Mr. Claiborne's response, as well as the dialogue following indicate clearly that the Government would pursue its defenses in this

(Continued on following page)

The statement does not—and could not—waive the United States' immunity in this action. Instead, the more appropriate reading of that language, in our view, is that the Court would not consider the boundary issues in *Arizona v. California II* until the district court litigation was resolved. The holding below may delay the resolution of the boundary issues in *Arizona v. California II*, but that unfortunate result cannot confer jurisdiction on the district court.

III. THE McCARRAN AMENDMENT WAS NOT MEANT TO FURTHER THE ADJUDICATION OF ISSUES MERELY RELATED TO THE ADJUDICATION OF INDIAN WATER RIGHTS.

The petitioners also seek solace in the McCarran Amendment, claiming that the so-called partial adjudication which they seek is consistent with the intent of Con-

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(Continued from previous page)

case. See Transcript of Oral Argument at p. 62 (December 8, 1982), *Arizona v. California II*:

> Mr. CLAIBORNE: I hope I do not have to—I disown the motion to dismiss which has been filed by the United States in the district court. Whether that—all of those defenses or some of them will prevail in that court is something which—
>
> QUESTION: Well, suppose they had prevailed. Would you still take the same position here?
>
> MR. CLAIBORNE: Yes, we would. And—we would, assuming that that decision had survived appeal or had not been appealed, and had sustained our motion to dismiss, we would rest on the correctness of that ruling, and there is much law to the effect that—

The Court's opinion also demonstrates that it did not believe that the United States was withdrawing its objections to the lower court litigation. See, e.g., 460 U.S. at 678.

gress in passing that legislation. Longstanding precedent is to the contrary. As the Court of Appeals properly recognized, "[t]he McCarran Amendment . . . does not authorize private suits to decide priorities between the United States and particular claimants, only suits to adjudicate the rights of all claimants on a stream, *Dugan v. Rank*, 372 U.S. 609, 617-618 (1963)." App. at 11a.

Absolutely nothing in the language or the history of the McCarran Amendment suggests an intent to waive the immunity of the United States in instances in which litigants claim that the issues to be confronted by the court relate to the determination of water rights. Even when viewed most favorably toward the petitioners, this case "is a private suit to determine water rights solely between the [petitioners] and the United States . . . all of the claimants to water rights along the river are not made parties, no relief is either asked or granted as between claimants, nor are priorities sought to be established. . . ." *Dugan v. Rank, supra*, 372 U.S. 618-619. Certainly, this case cannot be said to resolve the outstanding issue of the nature and scope of the tribal water rights associated with the disputed lands. In fact, it would be impossible for the lower court to address that issue, since the question remains before this Court in the exercise of its original jurisdiction in *Arizona v. California*. The result is that the McCarran Amendment cannot be read to permit suit to be brought against the United States in these circumstances.

That conclusion does not thwart the purposes of the McCarran Amendment which was intended to eliminate the immunity of the United States as a barrier to the determination of water rights in what were otherwise all-en-

compassing water adjudications. *See* S.Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951), quoted in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810-11 (1976); *see also California v. Rank*, 293 F.2d 340, 347-48 (9th Cir. 1961), *aff'd Dugan v. Rank, supra*. Dismissal here does not foreclose the full adjudication of the water rights held by the United States for the benefit of the Tribes, because those rights are squarely before the Court in *Arizona v. California*. Stated simply, the McCarran Amendment is not implicated by this litigation.

———o———

IV. CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated this 17th day of March, 1988.

Respectfully submitted,

DALE T. WHITE
WHITEING, THOMPSON & WHITE
1050 Walnut, Suite 212
Boulder, CO 80302

Attorney for the Fort Mojave Indian Tribe

WILLIAM E. STRICKLAND
STRICKLAND & ALTAFFER
700 Transamerica Bldg.
Tucson, AZ 85701

Attorney for the Quechan Indian Tribe

SCOTT B. McELROY
Counsel of Record
GREENE, MEYER & McELROY
1007 Pearl Street, Suite 240
Boulder, CO 80302
303/442-2021

Attorney for the Colorado River Indian Tribes

Supreme Court, U.S.
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No. 87-1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF CALIFORNIA, THE STATE OF ARIZONA, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, and COACHELLA VALLEY WATER DISTRICT,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONERS

WARREN J. ABBOTT, *General Counsel*
FRED VENDIG, *Assistant General Counsel*
KAREN L. TACHIKI, *Deputy General Counsel*
JAMES F. ROBERTS, *Deputy General Counsel*
THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
P.O. Box 54153
Los Angeles, California 90054-0153

JEROME C. MUYS
Counsel of Record
THOMAS W. WILCOX
WILL & MUYS
1825 Eye Street, N.W., Suite 920
Washington, D.C. 20006
(202) 429-4344

Attorneys for The Metropolitan Water District of Southern California

June 9, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

JUSTIN MCCARTHY
REDWINE & SHERRILL
1950 Market Street
Riverside, California 92501

Attorney for Coachella Valley Water District

JOHN K. VAN DE KAMP, *Attorney General of the State of California*
R. H. CONNETT,
N. GREGORY TAYLOR,
Assistant Attorneys General
DOUGLAS B. NOBLE,
Deputy Attorney General
3580 Wilshire Boulevard, Suite 600
Los Angeles, California 90010

Attorneys for the State of California

ROBERT K. CORBIN, *Attorney General*
ANTHONY B. CHING, *Solicitor General*
1275 West Washington Street
Phoenix, Arizona 85007

Attorneys for the State of Arizona

QUESTIONS PRESENTED

(1) Whether the conceded waiver of sovereign immunity by the United States in intervening and asserting water rights claims for certain Indian reservations in *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*) extends to an ancillary action in a District Court to determine the disputed boundaries underlying those same claims as mandated in *Arizona v. California*, 460 U.S. 605 (1983) (*Arizona II*).

(2) Whether the Quiet Title Act applies to an action for judicial review of decisions by the Secretary of the Interior redefining and enlarging the boundaries of three Indian reservations where the action (a) seeks a determination of the boundaries solely to measure the implied water rights for the reservations and (b) does not seek to divest the United States of any part of its title to the disputed lands.

(3) Whether, if the Quiet Title Act is applicable, its exception for "trust or restricted Indian lands" bars judicial review where the United States has made no showing that the disputed areas are such lands other than to rely on the three disputed *ex parte* Secretarial orders at issue, two of which (Fort Mojave and Colorado River) were based on interpretations rejected by the Special Master in *Arizona I* and the third (Fort Yuma (Quechan)) overturned three prior departmental decisions to the contrary.

(4) Whether the boundary disputes present "cases or controversies".

LIST OF PARTIES

The parties to the proceedings below were:

Petitioners the State of California, the State of Arizona, The Metropolitan Water District of Southern California and Coachella Valley Water District, the latter two petitioners being public agencies of the State of California.

Respondents the United States of America, Donald P. Hodel, Secretary of the Interior, Quechan Indian Tribe, Fort Mojave Indian Tribe and Colorado River Indian Tribes.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1165

THE STATE OF CALIFORNIA, THE STATE OF ARIZONA,
THE METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA,
AND COACHELLA VALLEY WATER DISTRICT,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported as *Metropolitan Water District of Southern California v. United States* at 830 F.2d 139 (1987) and is reprinted in the appendix to the petition for a writ of certiorari (Pet. App. at 1a).

The memorandum decision of the United States District Court for the Southern District of California (Brewster, D.J.) is reported as *Metropolitan Water*

District of Southern California v. United States at 628 F.Supp. 1018 (1986) and is reprinted in the appendix to the petition for a writ of certiorari (Pet. App. at 12a).

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1331, petitioners The Metropolitan Water District of Southern California and Coachella Valley Water District brought this suit in the Southern District of California against respondents the United States and the Secretary of the Interior under the judicial review provisions of the Administrative Procedure Act (5 U.S.C. §702). The respondent tribes intervened as defendants and the States of California and Arizona were later joined as nominal defendants, although they aligned themselves with plaintiffs and are now petitioners here. The District Court denied respondents' motions for summary judgment, granted petitioners' cross-motion for summary judgment in part, declared the Secretary's 1974 order redetermining the boundary of the Fort Mojave Indian Reservation invalid, and set the boundary issue for trial.

Respondents obtained an order granting an interlocutory appeal on the merits of the District Court order. However, on that appeal respondents later raised the claim that the District Court lacked jurisdiction because (1) the United States had not waived its sovereign immunity and (2) petitioners Metropolitan and Coachella lacked standing to bring the action, defenses which had been intentionally waived in the District Court. The Ninth Circuit reversed on the ground that the District Court lacked jurisdiction because the suit was against the United States and

sovereign immunity had not been waived. The Ninth Circuit's judgment was entered on October 14, 1987. The petition for a writ of certiorari was filed on January 11, 1988, and was granted on April 25, 1988. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATUTES INVOLVED

(1) Administrative Procedure Act, 5 U.S.C. §702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. . . . Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(2) Quiet Title Act, 28 U.S.C. §2409a

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under . . . section 208 of the Act of July 10, 1952 (43 U.S.C. §666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

• • •

(3) McCarran Amendment, 43 U.S.C. §666

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. . . .

• • •

(4) 43 U.S.C. §772

The Secretary of the Interior may, as of March 3, 1909, in his discretion, cause to be made, as he may

deem wise under the rectangular system on that date provided by law, such surveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

STATEMENT OF THE CASE

This case arises out of the historic water rights adjudication by this Court in *Arizona v. California*, 373 U.S. 546 (1963) (hereafter "*Arizona I*") and its aftermath, *Arizona v. California*, 460 U.S. 605 (1983) (hereafter "*Arizona II*"). It involves the attempt by petitioners (hereafter "State Parties") to obtain a determination of two Indian reservation boundary disputes left unresolved in this Court's 1963 decision in *Arizona I* (Fort Mojave and Colorado River) and one which was presented but not decided in *Arizona II* (Fort Yuma (Quechan)), so that the reservations' water rights may be finally established in order to facilitate necessary water planning in California and Arizona. This Court in *Arizona II* invited the States of California and Arizona to intervene in an action brought by The Metropolitan Water District of Southern California (hereafter "Metropolitan") and Coachella Valley Water District (hereafter "Coachella") in the United States District Court for the Southern District of California to determine those three boundaries. The States were added as parties and have fully participated in the proceedings below. The amount of water at issue is about 104,000 acre-feet of diversions

in California, which is enough water to supply about 500,000 people annually in Metropolitan's service area.

Metropolitan imports water to the Southern California coastal plain and wholesales that water to its twenty-seven member public agencies in an area stretching from Ventura to the Mexican border and encompassing over one-half the population of the state. A major portion of Metropolitan's water is obtained from the Colorado River pursuant to contracts with the Secretary of the Interior for the storage and delivery of Colorado River water pursuant to the Boulder Canyon Project Act (43 U.S.C. §617 *et seq*).

In *Arizona I* California's share of the 7.5 million acre-feet of Colorado River water which was allocated to Arizona, Nevada, and California by the Secretary pursuant to the Boulder Canyon Project Act was limited to 4.4 million acre-feet a year, plus one-half of any surplus. In addition, five Indian reservations along the lower Colorado River were awarded "implied" water rights based upon the *Winters* doctrine, *i.e.*, enough water to satisfy the "reasonable needs" of the reservations. *Winters v. United States*, 207 U.S. 564 (1908). The "reasonable needs" of the Indians were measured by the amount of "practicably irrigable acreage" on each reservation multiplied by a unit diversion duty for such acreage. *Arizona I* at 600-01. The reservations' priority dates are their dates of creation or the date of any subsequent additions. Each reservation was created long before Metropolitan's water contracts with the Secretary.

Special Master Simon H. Rifkind recommended an award to the five mainstream reservations of 905,498 acre-feet of diversions for 135,636 acres of "practicably irrigable acreage", even though the maximum

annual irrigated acreage on those reservations never exceeded 36,000 acres.[1] California had contested whether certain lands for which *Winters* rights were sought by the United States for the Colorado River and Fort Mojave Reservations were actually within their boundaries. The boundary of the Fort Yuma Reservation was not challenged since the United States' claim at that time was consistent with long-standing Departmental interpretation of that boundary, an interpretation which was later overturned by the 1978 Secretarial order challenged below. The Fort Mojave and Colorado River boundary issues were tried before Special Master Rifkind, who largely rejected the United States' boundary claims, adopted the California positions, and recommended water allocations for those reservations based upon his boundary determinations. This Court, in otherwise adopting the recommendations of the Special Master with respect to the United States' Indian claims, found it "unnecessary to resolve those [boundary] disputes here." *Id.* at 601.[2]

The Court's 1964 Decree (376 U.S. 340, 345) nevertheless awarded water rights to the two reservations based upon the Special Master's boundary determinations, "subject to appropriate adjustment by agree-

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[1] California Proposed Findings 4C:104, 4D:103, 13D:104, 14C:108, 18E:104 and 18F:104, *Arizona v. California* (No. 8, Orig., Oct. Term 1958).

[2] Special Master Rifkind had recommended "practicably irrigable acreage" as the measure of the reserved water rights because, *inter alia*, it would "provide certainty for both the United States and non-Indian users." Report of Special Master Simon H. Rifkind (December 5, 1960) at 265. That objective has been frustrated by the three unresolved reservation boundary disputes which are the subject of this action.

ment or decree of this Court in the event that the boundaries of the respective reservations are finally determined." The quantities awarded are charged to the allocation of the state in which the reservation is located. Because of Metropolitan's junior priority, all parties concede that any additional water rights for the reservations in California will necessarily reduce Metropolitan's supply during any year when California's entitlement is restricted to 4.4 million acre-feet. That limitation is no more than several years away now that the Central Arizona Project is on line. Metropolitan is heavily engaged in efforts to obtain a replacement supply for the water that will be diverted to Arizona and needs to know whether it faces an additional curtailment in the amount of some or all of the 104,000 acre-feet of diversions involved in the three boundary disputes. Likewise, any additional water rights for that portion of the Fort Yuma Reservation in Arizona will necessarily reduce the supply available to other users in Arizona holding junior rights within Arizona's fixed entitlement of 2.8 million acre-feet.

The three Secretarial Orders which are the subject of the litigation below were issued in 1969 (Colorado River), 1974 (Fort Mojave) and 1978 (Fort Yuma). There is no disagreement that the proper location of the reservation boundaries is the essential first step in establishing the measure of any implied water rights to which these reservations may be entitled under *Arizona I*. It is also not disputed that the Secretary's Fort Mojave and Colorado River reservation boundary orders were based on the same interpretations which California had successfully resisted in the trial before Special Master Rifkind. Nevertheless,

all three of the orders were entered without affording Metropolitan or any other affected water users notice or opportunity to be heard and purport to redetermine the boundaries *retroactive* to the date of their creation. The undisputed result is to give each reservation additional acres upon which to base a claim for additional water rights with an earlier priority than Metropolitan's.

The culmination of the Secretary's *ex parte* boundary determinations was the United States' petition filed in December 1978 to reopen *Arizona I* and, *inter alia*, allocate additional water rights to the three reservations for the practicably irrigable acreage within the added areas. The Special Master (Senior Fifth Circuit Judge Elbert P. Tuttle) appointed to hear those claims refused to consider the merits of the Secretary's *ex parte* orders, accepting the United States' argument that they constituted "final determinations" of the boundaries. *Arizona II* at 634-35. Over the objections of the State Parties he conducted a trial solely on the issue of the irrigability of the added lands and recommended an award to the three tribes of an additional 104,000 acre-feet of diversions annually.

Faced with the denial of their day in court, Metropolitan and Coachella sought review of the Secretarial boundary orders in the United States District Court for the Southern District of California under the judicial review provisions of the Administrative Procedure Act (hereafter "APA") (5 U.S.C. §702). Their amended complaint pleaded six claims for relief asking for judicial declarations (1) of the proper boundary in each of the three disputed areas and (2) that certain lands in the present or former bed of

the Colorado River located within the revised boundaries of the reservations were owned by Arizona and California and thus could not provide the basis for a *Winters* right. The State Parties' subsequent opposition to Special Master Tuttle's report in *Arizona II* made clear the limited purpose of the District Court action and that it in no way sought to "quiet title" to the lands involved in the water agencies or to otherwise divest the United States of title. For example, in oral argument Justice O'Connor posed the following question to counsel for Metropolitan:

> Question: The states don't claim any interest in the land itself. You are concerned only with the water rights attached to it which might change because of the boundary change. Is that right?
>
> Mr. Boronkay: That is correct. . . .

Transcript of Oral Argument, *Arizona II* (December 8, 1982) at 14-15 (hereafter "Oral Argument").

It was against that background that this Court, after describing the State Parties' efforts to obtain a resolution of the boundary disputes as being "only for the limited purpose of establishing additional Indian water rights, if any" (*Arizona II* at 634), rejected Special Master Tuttle's recommendations and directed the State Parties to pursue the District Court action:

> . . . we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute 'final determinations' that could adversely affect the States, their agencies or private water users holding priority rights.

* * *

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and are not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.

Arizona II at 636, 638 (footnotes omitted).

Moreover, the Court's reference to the defenses raised by the United States in the District Court action, including sovereign immunity, was made after the Deputy Solicitor General had "disowned" those defenses in oral argument.[3] Following this Court's decision in *Arizona II* the United States amended its motion to dismiss the District Court action to with-

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[3] The exchange between Justice White and Deputy Solicitor General Claiborne on this point is set out in the appendix to this brief.

draw all of the defenses except its challenge to the three claims which asked for declarations as to the ownership of certain riverbed lands. It offered the following explanation:[4]

> Upon consideration of the issues involved, the defendants believe it appropriate to withdraw most of the objections raised in their earlier motion to dismiss. *Where the action merely questions the accuracy of the determination of reservation boundaries, and the legal title to the lands is not at issue, we think the action may go forward pursuant to the Administrative Procedure Act.* We continue to object, however, to the portion of the suit that claims that title to certain riverbed lands should be vested in the State of Arizona or the State of California. It appears to us that that portion of the suit is barred, among other things, by the terms of the Quiet Title Act. . . .

The District Court subsequently dismissed the riverbed claims. The parties then agreed to address the boundary disputes individually, starting with Fort Mojave. Cross motions for summary judgment were filed, followed by extensive briefing and three days of oral argument during which the United States conceded that Metropolitan is "a party aggrieved by the Secretary's action and that they have standing under the APA." Transcript of District Court proceedings of December 10, 1984 at 104.

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[4] U.S. Memorandum in Support of Motion to File Amended Motion to Dismiss at 3 (June 17, 1983) (emphasis added).

The District Court voided the Secretary's Fort Mojave order on the basis that (1) the Secretary could not exercise his authority to correct allegedly erroneous surveys under 43 U.S.C. §772 in a manner that would impair Metropolitan's water rights because Metropolitan was a "claimant" protected by the proviso to that statute and (2) in any event, Metropolitan's water supply contracts entitled it to procedural due-process protection, which it had been denied. The District Court also held that a *de novo* trial as to the proper boundary was appropriate under *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), because (1) the Secretary's 1974 order constituted a partial "adjudication" of Metropolitan's water rights and (2) the Secretary's fact-finding procedures were grossly inadequate because Metropolitan had not been given any notice of the Secretary's *ex parte* procedure nor any opportunity to be heard.

The United States and the Tribes moved the District Court for an order certifying its decision for an interlocutory appeal under 28 U.S.C. §1292(b). In their pleadings the Tribes asserted that: "Following the Supreme Court's 1983 decision in *Arizona v. California*, the conclusion that MWD's interests merit judicial review of the Secretary's decisions is not subject to question. . . . [and] the parties intend this litigation to constitute the necessary review."[5] The District Court granted those motions.

After the Court of Appeals had granted an interlocutory appeal, respondents decided that they did not

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[5] Memorandum of the Fort Mojave Indian Tribe, The Quechan Tribe and the Colorado Indian Tribes in Support of Their Motion to Certify Issues for Interlocutory Appeal at 20-21, notes 7 and 8 (March 25, 1986).

want the District Court to decide the merits of the boundary issues and resurrected the sovereign immunity and standing defenses which they had earlier abandoned. The Court of Appeals was persuaded that the Quiet Title Act (hereafter "QTA") precluded the State Parties' action and ordered the District Court to dismiss the case for lack of jurisdiction (Pet. App. at 1a). It also suggested that the action "presents the additional jurisdictional problem of the absence of a case or controversy", but did not decide that issue (Pet. App. at 6a). It did not address the merits of the District Court's decision. The court also did not address (1) the Tribes' contention that the suit was barred by the QTA's 12 year statute of limitations because the State Parties knew of the United States' boundary claims as early as the original litigation of those disputes in the 1950's in *Arizona I* and (2) the United States' suggestion that, even if the APA applies to the State Parties' claims, two of those claims may be barred by the 6 year statute of limitations in 28 U.S.C. §2401.[6]

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[6] Opening Brief for Tribal Appellants (February 1987) at 23-24; U.S. Reply Brief (May 1987) at 5, n. 2. The respondents' arguments would require the State Parties, who prevailed in *Arizona I* with regard to the Fort Mojave and Colorado River Reservation boundary issues, to have immediately commenced an action to relitigate the same issues, a procedure totally at odds with this Court's conclusion in *Arizona II* that the United States had that burden. *Arizona II* at 637.

The 1981 District Court action was timely as to the 1978 Fort Yuma order under either the United States' or the Tribes' theory. With respect to the 1969 Colorado River and 1974 Fort Mojave orders, the State Parties contend that no cause of action accrued with respect to either until 1978 when the United States filed its petition to reopen the decree in *Arizona I* for the allocation of additional *Winters* rights based on those orders. But even if those causes of action accrued in 1969 and 1974, either limitation period should be tolled while the boundary issues were in contention before this Court in the sequential stages of *Arizona v. California* resulting in the decision in *Arizona II*. See *Burnett v. New York Central R.R.*, 380 U.S. 424 (1965).

The Ninth Circuit's decision rests on several basic premises: (1) the waiver of sovereign immunity by the United States in asserting water rights claims for the three reservations in *Arizona v. California* does not extend to the litigation of the boundary components of those same claims in the ancillary proceeding before the District Court; (2) the waiver of sovereign immunity in the Administrative Procedure Act (5 U.S.C. §702) is not applicable because the Quiet Title Act (28 U.S.C. §2409a) is a "statute that grants consent to suit [and] expressly or impliedly forbids the relief which is sought" because it bars actions to quiet title to "trust or restricted Indian lands" and "the effect of a successful challenge [by petitioners] would be to quiet title in others than the Tribe" (Pet. App. at 9a); and (3) the action is not basically a water rights suit and, in any event, the QTA's preservation of the McCarran Amendment's waiver of sovereign immunity for water rights adjudications involving the United States is not applicable because the State Parties do not seek a "general stream adjudication".

SUMMARY OF ARGUMENT

The waiver of sovereign immunity which resulted from the United States' intervention in *Arizona I* to assert reserved water rights under the *Winters* doctrine for all practicably irrigable acreage within the boundaries of the Fort Mojave, Colorado River and

Fort Yuma Indian reservations extends to the present suit in the District Court to resolve the critical disputed boundary components of those claims. That waiver is not limited to the original *forum* in which the federal claims were presented, *i.e.*, this Court, but relates to the *issues* reasonably encompassed within the subject matter of the claims. Since the claims were not resolved by this Court, the State Parties affected by the claims are entitled to seek judicial resolution of the disputes either in this Court or any other appropriate forum provided that the relief sought does not exceed that originally sought by the United States. There are no public policy reasons which support limiting the waiver to the original forum selected by the United States. To so limit the waiver would permit the continued inequitable forum shopping by the United States which has characterized its strategy in the 30 years since its boundary claims were unsuccessfully presented in *Arizona I*.

The extension of the sovereign immunity waiver to the District Court action is particularly appropriate since this Court's decision in *Arizona II* clearly treated the District Court action as ancillary to the proceedings in *Arizona v. California* over which this Court has retained continuing jurisdiction.

The Secretarial boundary determinations at issue are also subject to review under the Administrative Procedure Act's sovereign immunity waiver (5 U.S.C. §702). The Quiet Title Act (28 U.S.C. §2409a) is not a statute which expressly or impliedly precludes such review. The language, legislative history and judicial interpretation of that Act make it clear that it applies only to suits seeking to divest the United States of some or all of its interests in land. The State Parties

seek no such relief, but only a determination of the proper reservation boundaries for the limited purpose of determining the extent of the reservations' implied *Winters* water rights. The District Court action is a unique suit relating to water rights, which the QTA leaves unaffected and is not precluded by any other federal statute.

Even if the QTA were applicable, the United States must do more than merely allege that the disputed lands are "trust or restricted Indian lands" in order to invoke the QTA's exemption of such lands from its sovereign immunity waiver. At the very least, the United States must prove that there is a "substantial possibility" that the disputed lands are Indian lands, as the Eighth Circuit has required. The United States has made no such showing and, in light of the circumstances surrounding the disputed Secretarial decisions, cannot do so.

Although the Ninth Circuit only suggested, but did not decide that the boundary disputes do not present "cases or controversies", that conclusion is in error and should be corrected now. This Court's decision in *Arizona II* clearly assumed the existence of a justiciable controversy ripe for decision. The "probability" of "threatened injury" to Metropolitan is adequate to sustain jurisdiction even though the challenged boundary orders have not yet resulted in a reduction of Metropolitan's water supply, particularly since water is currently being diverted to the disputed lands on the Fort Mojave Reservation and the Colorado River Tribes have recently circulated for public comment a proposed land use development plan for the disputed lands on that reservation.

ARGUMENT

I. The United States has waived its sovereign immunity as to the reservation boundary disputes by asserting Indian water rights for the reservations in *Arizona I*.

There is no dispute that the United States' intervention in *Arizona I* and its assertion of *Winters* rights for the Fort Mojave and other Indian reservations waived its sovereign immunity to the extent necessary to adjudicate those claims.[7] The State Parties contend that such waiver extends to ancillary proceedings, such as the District Court litigation below, in which essential elements of those same federal claims are presented. The issue appears to be one of first impression. However, this Court long ago held, in a classic opinion by Justice Holmes, that "when the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done *with regard to the subject matter*." *Luckenbach S.S. Co. v. The Thekla*, 266 U.S. 328, 339-40 (1924) (emphasis added). The Fifth and Tenth Circuits have held that in such circumstances a later independent action or claim in intervention against the United States with respect to the same subject matter in the same district court are not barred by sovereign immunity. *United States v. Taunah*, 730 F.2d 1360 (10th Cir. 1984) (Indian land dispute); *United States v. Martin*, 267 F.2d 764, 769-70 (10th Cir. 1959) (water rights claims); *Jones v. Watts*, 142 F.2d 575 (5th Cir. 1944).

[7] *Arizona I* at 551. Justice White put the issue succinctly to counsel for the United States during oral argument in *Arizona II*:

> Question: But the United States is in this Court litigating . . . so it is subject to . . . having its case decided here. You can't get out of this case with a sovereign immunity claim.
>
> Mr. Claiborne: I appreciate that . . .

Oral Argument at 62.

Although the State Parties have found no case holding that the waiver of sovereign immunity which results from the United States' assertion of a claim in one forum extends to a separate suit in another forum on the same subject matter seeking resolution of an issue necessarily presented by the United States' claim, such a result may reasonably be implied from *The Thekla, supra*. Just as this Court made clear in rejecting Arizona's contention that its sovereign immunity barred intervention by the Tribes in *Arizona II*,[8] the United States' sovereign immunity is not compromised by requiring it to litigate in the District Court the identical claims it presented and litigated (unsuccessfully) before this Court in *Arizona I*, but which the Court left open for future resolution elsewhere. The State Parties seek no affirmative relief of any kind against the United States, *e.g.*, damages for permitting water diversions to the disputed area on the Fort Mojave Reservation in violation of the decree in *Arizona I*. Like a permissible counterclaim, the issue which the State Parties seek to have re-

[8] "The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised."

Arizona II at 614.

solved "arises out of the same transaction or occurrence as the main suit and the relief sought neither exceeds nor is different in kind from that demanded by the Sovereign". *United States v. Penn*, 632 F.Supp. 691, 693 (D.V.I. 1986). Consequently, as Justice Holmes concluded in *The Thekla*, "the reasons are strong for not obstructing the application of natural justice against the Government by technical formulations when justice can be done without endangering any public interest . . . [The Government] joined in the suit, and that carried with it the acceptance of whatever liability the *courts* may decide to be *reasonably incident to that act*." 266 U.S. at 341 (emphasis added).

The United States has not identified any public interest that would be endangered by extending the *Arizona v. California* waiver to the District Court action. Although Congress clearly may choose to limit a legislative waiver of sovereign immunity to particular courts (*United States v. Shaw*, 309 U.S. 495, 501 (1940)), there is no reason to so limit the judicially created *Thekla* rule in this case. Moreover, applying the *Arizona v. California* waiver to the general subject matter of the United States' *Winters* claims without limitation as to forum would be consistent with this Court's suggestion in *California v. Arizona*, 440 U.S. 59, 66-67 (1979), that the Congressional sovereign immunity waiver for quiet title actions in the QTA might have broadly extended to state courts had Congress not expressly restricted such jurisdiction to the federal courts.

The Ninth Circuit rejected the State Parties' argument on the ground that "an application to the Supreme Court under a continuing decree for a real-

location of water rights cannot be viewed, under any stretch of the imagination, as consent to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation boundaries". Pet. App. at 8a. That analysis is plainly in error and evidences a lack of understanding of the critical relevance of a Secretarial boundary determination to the magnitude of a *Winters* water right. The United States told this Court in *Arizona I* that "the determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation" and, as this Court later noted, "all of the parties treated the boundary matters as fully adjudicable issues of material fact or law." *Arizona II* at 637.

The United States, having had (1) its underlying boundary claims for the Fort Mojave and Colorado River reservations rejected in *Arizona I*, (2) its subsequent attempt to preclude judicial review of its *ex parte* validation of those same claims, along with its 1978 Fort Yuma decision, rebuffed in *Arizona II*, and (3) the boundary issues referred to the District Court for resolution, should not be permitted to run for cover after the District Court invalidated the Secretary's unlawful Fort Mojave boundary determination procedures. The United States' blatant forum-shopping strategy should be rejected.

The State Parties believe that the *Thekla* rule is particularly applicable to this controversy. This Court's directions to the District Court in *Arizona II* clearly linked those proceedings to the original proceedings in this Court, even if those directions may have fallen short of actually designating Judge Brewster a special master for the limited purpose of de-

termining the boundaries (a course of action that the State Parties believe remains open to the Court):

> Hence, in our judgment, the litigation filed in the United States District Court for the Southern District of California should go forward, intervention motions, if any are to be made, should be promptly made, and the litigation expeditiously adjudicated. If there are issues in that action without substantial connection to the issues in this original action, they should be severed and adjudicated separately if their consideration would substantially delay the final resolution of the questions which have made it necessary to keep our decree in this action open to accommodate the results of unresolved issues.

Arizona II at 639 (emphasis added).

That directive followed rejection of the arguments of the States of Arizona and California that this Court should decide the boundary issues. Acknowledging that "the States have not yet sought to intervene in that litigation" (*id.* at 638), the Court directed that "intervention motions . . . should be promptly made "and "[i]f the States and/or the agencies wish to challenge the recently finalized administrative action regarding the 'Checkerboard area' . . . , they should amend their complaint and raise the issue in the District Court suit." *Id.* at 639. Although the Court's directions were not instructions on remand, since the District Court action was not directly before it, they were far more than advisory. The Court was clearly shifting the arena for the necessary resolution of the boundary disputes from a traditional Court-appointed

Special Master to the District Court. By that action the State Parties believe that the Court did not intend to nullify the waiver of sovereign immunity with respect to those same claims which resulted when the United States initially presented them in *Arizona I*.

We know of no reason why the Court may not utilize district courts to conduct proceedings ancillary to cases in its original jurisdiction, even though Congress has not expressly so provided. When it does, the district court's jurisdiction would be derivative from this Court, much like the rule on removal of cases from state to federal courts that existed prior to the Judicial Improvement Act of 1986 (28 U.S.C. §1441(e)). *Minnesota v. United States*, 305 U.S. 382, 389 (1939) (district court jurisdiction on removal derives from state court jurisdiction). That derivative jurisdiction would encompass the United States' waiver of sovereign immunity resulting from its intervention in this Court.

Although treating the District Court action as ancillary to the proceedings in *Arizona v. California* for sovereign immunity purposes would be without direct precedent, it is analogous to the concepts of ancillary and pendent jurisdiction. Those doctrines appear to be grounded on a common sense, equitable rationale permitting federal courts to decide all issues arising out of a single transaction or occurrence involving multiple claims even though a particular claim may lack a federal jurisdictional basis, at least where no clear constitutional or statutory prohibition precludes such jurisdiction. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976). Similarly, in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800

(1976), this Court dealt with a difficult jurisdictional problem involving Indian reserved rights adjudications by invoking general "principles [which] rest on considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation' ". *Id.* at 817.

Finally, considering the frustrating delay that has already attended the State Parties' unsuccessful attempts to achieve a resolution of the boundary disputes over the past ten years, the State Parties urge the Court to short-circuit the United States' dilatory, forum-shopping strategy and designate District Judge Brewster as special master in *Arizona v. California* to complete his pending review of the Secretary's boundary determinations and submit his recommendations to the Court as expeditiously as possible. Otherwise, the State Parties forsee an endless series of appeals between the District Court, the Ninth Circuit, and this Court. The present sovereign immunity issue is just the first of several delaying tactics available to the United States. Lurking in the wings, even if the State Parties prevail on the APA versus QTA issue, are (1) the "case or controversy" issue which the United States raised before the Ninth Circuit but which that court did not decide (page 47 *infra*), (2) the statute of limitations issues raised by the Tribes and the United States (page 14 *supra*) but also not decided by the Ninth Circuit, as well as (3) the issues relating to the Secretary's resurvey authority under 43 U.S.C. §772 and the appropriate scope and standard of review of his boundary determinations, which were the issues presented on the interlocutory appeals below but not addressed by the Ninth Circuit.

II. The Administrative Procedure Act's waiver of sovereign immunity is applicable to the District Court action because neither the Quiet Title Act nor any other statute expressly or impliedly forbids the relief sought.

The Administrative Procedure Act (5 U.S.C. §702) was amended in 1976 to remove the barrier of sovereign immunity to suits for declaratory or injunctive relief against the United States, its agencies or officers. A qualification is that the amended section 702 does not authorize such relief if "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The Ninth Circuit's conclusion that the Quiet Title Act is such a statute is patently wrong.

The starting point for analysis of whether the QTA precludes the relief sought by the State Parties is the well established rule that APA review "is available absent some clear and convincing evidence of legislative intention to preclude review." *Japan Whaling Ass'n v. American Cetacean Soc'y*, ___ U.S. ___ , 106 S.Ct. 2860, 2866 (1986). The QTA waives sovereign immunity for actions "to adjudicate a disputed title to real property in which the United States claims an interest" but "does not apply to trust or restricted Indian lands. . . ." 28 U.S.C. §2409a(a).

The plain language of the QTA makes it clear that Congress intended it to apply only to suits seeking to divest the United States of some or all of its interests in land. Thus section 3(c) requires that a party bringing a suit under the Act must "set forth with particularity the nature of the right, title or interest which [it] claims in the real property". 28 U.S.C. §2409a(c). That the "quiet title" claim which must be

specifically alleged is one which would divest the United States of some or all of its title is further made evident by section 3(b), which provides that if the adverse private claim is sustained the United States may elect to retain the land and pay just compensation to the claimant. 28 U.S.C. §2409a(b). Inasmuch as it is undisputed that the State Parties have alleged no claim to the lands in the disputed area, the QTA is plainly not applicable. *See, e.g., Prater v. United States*, 618 F.2d 263 (5th Cir. 1980); *Kinscherff v. United States*, 586 F.2d 159 (10th Cir. 1978); *City of Sault Ste. Marie, Michigan v. Andrus*, 458 F.Supp. 465 (D.D.C. 1978). In *Landow v. Carmen*, 555 F.Supp. 195, 197 (D. Md. 1983), the court observed that "although there are many reported cases on the Quiet Title Act, this Court is not aware of any case holding that a dispute about a non-ownership interest is sufficient to confer Quiet Title Act jurisdiction." The State Parties' research confirms that analysis, and the United States seems to concede the point in its opposition to the State Parties' certiorari petition (U.S. Opp. Br. at 12):

> When Congress passed the QTA, it permitted challenges to the United States' claim of title to real property to be brought only by plaintiffs who themselves claim an interest in the same property.

Consequently, the District Court action cannot be viewed as one authorized under the QTA so as to preclude the APA waiver of sovereign immunity, as the United States told the District Court in amending its motion to dismiss (page 12 *supra*). On the contrary, it is a hybrid action necessitated solely because of this Court's decisions in *Arizona I* and *II* that (1)

"practicably irrigable acreage" is the measure of the Indian reservations' *Winters* rights and (2) the boundary disputes should be resolved in another forum. As such, it falls into the category described by the Justice Department's comments on the bill which added the sovereign immunity waiver to 5 U.S.C. §702 as follows:

> In the many areas where Congress has not acted, however, and *when its action is not addressed to the type of grievance which the plaintiff seeks to assert, suit would be allowed.*

S. Rep. No. 996, 94th Cong., 2d Sess. 27 (1976) (letter from Assistant Attorney General Scalia to Senator Kennedy) (emphasis added).

The statutory language is reinforced by its legislative history. S. 216 was introduced in 1971 to implement the 1970 recommendations of the Public Land Law Review Commission (PLLRC), on which three of the bill's sponsors had served.[9] Senator Jordan's opening statement at the Senate hearings on the bill made this clear:[10]

> Two of the bills before this hearing today, S. 216 and S. 579 are based upon recom-

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[9] Senators Jordan, Bible and Fannin were co-sponsors of S. 216. 117 Cong. Rec. 542 (1971). All served on the Public Land Law Review Commission. *One Third of the Nation's Land*, The Report of The Public Land Law Review Commission iv (1970) (hereafter "*PLLRC Report*").

[10] *Hearings on S. 216, S. 579 and S. 721 before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs.* 92d Cong., 1st Sess. 8 (1971) (hereafter "*Senate QTA Hearings*").

> mendations [growing] out of a 5-year study of the Public Land Law Review Commission on which I was privileged to serve. I hope that the Public Land Law Review Commission study and reports on the subject of omitted land and the related problems of suits to quiet title and the doctrine of adverse possession will help this panel expedite favorable action on these two measures.

Professor John Steadman, a consultant to the Administrative Conference of the United States on the subject of sovereign immunity, endorsed S. 216 and advised the Committee that it was consistent with Recommendation 113 of the PLLRC, which provided in pertinent part that "citizens should be permitted to bring quiet title actions in which the Government could be named as defendant." *Senate QTA hearings*, note 10 *supra*, at 65. The Commission defined "quiet title" in its statement explaining its recommendation as follows (*PLLRC Report*, note 9 *supra*, at 261 (emphasis added)):

> In any action brought against the Government to quiet title, *i.e., to establish who the owner is*, the Government has available to it the defense of sovereign immunity which it invariably asserts.

Similarly, throughout the hearings the witnesses focused solely on the need to afford private land claimants access to the courts in order to quiet title to areas in which *ownership* interests were in dispute between the United States and private claimants. *Senate QTA hearings*, note 10 *supra*, *passim*. A substitute bill proposed by the Justice Department did not

change the focus of the original proposal (*id.* at 30-31), as the Department's explanation of its proposal made clear:

> Perhaps the most common application of the proposed statute would be in boundary disputes between the United States and owners of adjacent property.

S. Rep. No. 575, 92d Cong., 1st Sess. 5 (1971).

Indeed, when the Senate Committee reported out what was essentially the Justice Department substitute, it stated that the bill was waiving sovereign immunity in quiet title actions because "[g]rave inequity often has resulted to private citizens who are thereby excluded, without benefit of a recourse to the courts, from *lands they have reason to believe are rightfully theirs*." *Id.* at 1 (emphasis added).

Adverting to the foregoing legislative history, this Court in *Block v. North Dakota*, 461 U.S. 273, 280 (1983), stated that the QTA was enacted against a background in which parties "*asserting title to land claimed by the United States* had only a limited means of obtaining a resolution of the title dispute" (emphasis added). It also recognized that the hearings on the proposed legislation reflected the "predominant view . . . that citizens asserting title to or the right to possession of lands claimed by the United States were 'without benefit of a recourse to the courts', because of the doctrine of sovereign immunity" and that "Congress sought to rectify *this state of affairs*" in the QTA. *Id.* at 282 (emphasis added).

Similarly, in its brief on the merits before this Court in *Block*, the United States characterized North Dakota's suit as one "to wrest title" from the Federal

Government (U.S. Br. at 11) and asserted that the QTA "established a uniform procedure for prosecuting claims to land to which the United States asserts title." *Id.* at 12. Significantly, the United States explained the relationship of 5 U.S.C. §702 to the QTA as follows:

> Of course, Section 702 allows challenges to the administration of federal lands on the ground that the actions complained of violate procedural or substantive restrictions imposed by applicable law. But the amendment to the APA was never conceived of as affording a vehicle for questioning the underlying title.

Id. at 23. The State Parties agree, and it is plain that the present boundary disputes fall into the former category, not the latter.

Consequently, it follows that the QTA's provision that it "does not apply to trust or restricted Indian lands" is similarly limited to claims that would divest the *United States* of some or all of its title to such lands, since it is the fee owner. *Minnesota v. United States*, 305 U.S. 382 (1939). As this Court recognized in *United States v. Mottaz*, 106 S.Ct. 2224, 2226 (1986) (emphasis added), the Indian lands exclusion "operates *solely* to retain the United States' immunity from suit by third parties challenging *the United States' title* to land held in trust for Indians." These were the kinds of claims made in *Mottaz*, *Spaeth v. United States Secretary of the Interior*, 757 F.2d 937 (8th Cir. 1985), and *Florida Dep't of Business Regulations v. United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied* 475 U.S. 1011 (1986). In *Mottaz* the plaintiff sought a declaration confirming her alleged beneficial ownership of certain lands purchased by the United States and included in a national forest. Contrary to the respondent Tribes' contention that "[g]ranting plaintiff's relief would not have divested the United States of its title since it would be Indian trust lands instead of National Forest lands" (Tr. Opp. Br. at 14), the relief sought would have significantly curtailed the United States' fee title interest by imposing a trust status on those lands. Such a reduction in the United States' ownership interest is plainly covered by the QTA. The Justice Department's explanation of the scope of its proposed bill which was later enacted stated that "[t]he quieting of title where the plaintiff claims an estate less than fee simple—an easement or the title to minerals—is likewise included in the terms of the proposed statute." S. Rep. No. 575, 92d Cong., 1st Sess. 5 (1971).

In *Spaeth* the plaintiffs sought a declaration that the United States' claim that title to certain tracts of plaintiffs' farm might rest in certain Indian allottees was without merit. In *Florida*, although the State was not seeking to quiet title in itself, the Eleventh Circuit nevertheless found the QTA applicable because Florida sought an order invalidating the challenged transaction and "*divesting the United States of its title to land* held for the benefit of an Indian tribe". 768 F.2d at 1254 (emphasis added).

The State Parties argued below that the Indian lands exemption was not applicable because their claim would not divest the United States of any of its ownership interests. In response, the Ninth Circuit broke new ground and concluded that the QTA applies where "the effect of a successful challenge [by

petitioners] would be to quiet title in others than the Tribe". Pet. App. at 9a. The "others" can only be the United States, because there are no other claims to the disputed area pending in the District Court. That kind of result clearly is not barred by the QTA, since it simply affects the Secretary of the Interior's intramural management of the federal lands—it does not divest the United States of any aspect of its legal title to the disputed area. As was cogently recognized in a similar boundary dispute in *Pueblo of Taos v. Andrus*, 475 F.Supp. 359, 365 (D.D.C. 1979): "The relief requested in this case affects no ownership interest; it would merely adjust the boundaries between two parcels of government-owned land, one of which is held for the benefit of the Taos Pueblo."[11]

The Tenth Circuit has also correctly recognized that "adjudicating reservation boundaries is conceptually quite distinct from adjudicating title to the same lands." *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987). Indeed, this Court recognized in *Arizona II* that such a boundary dispute might involve either "land titles or political jurisdiction". *Arizona II* at 629. The Ninth Circuit's failure to recognize the distinction, however, will frustrate resolution of important federal-state-Indian jurisdictional problems which flow from Secretarial orders

[11] The United States' opposition to the State Parties' certiorari petition asserts that *Pueblo of Taos* "is not at all instructive, because it was decided before this Court held in *Block* and *Mottaz* that the QTA is the exclusive means for challenging the United States' title." U.S. Opp. Br. at 13. The State Parties fail to see how the timing of the *Pueblo of Taos* decision affects the merits of that court's analysis of the effect of the boundary determination at issue.

affecting Indian reservation boundaries. Whether states have civil jurisdiction over various activities on Indian reservations may often turn on the proper location of a reservation's boundary, just as federal-state criminal jurisdiction turns on whether an area where a crime is committed is "Indian country" under 18 U.S.C. §1151. *See generally*, Cohen, *Handbook of Federal Indian Law*, ch. 6, sec. C (1982); *Ute Indian Tribe v. Utah*, 773 F.2d 1087, (10th Cir. 1985), *cert. denied* ___ U.S.___ , 107 S.Ct. 596 (1986). The boundary issues raised in the numerous "reservation disestablishment" cases, although not affecting land titles, are customarily presented and decided in habeas corpus proceedings, which no one has ever suggested are barred by the QTA. *See, e.g., Solem v. Bartlett*, 465 U.S. 463 (1984). However, under the Ninth Circuit's assumption that "all boundary disputes with the government" are governed by the QTA without regard to whether resolution of the boundary dispute would divest the United States of title (*Fadem v. United States*, 791 F.2d 1381, 1383 (9th Cir. 1986)) states would have no recourse to the courts under either the QTA or the APA to resolve critical jurisdictional disputes turning on Secretarial Indian boundary determinations. Congress obviously intended no such result in either act.

Beyond that error, the Court of Appeals further misconstrues the nature of the action below in asserting that "to allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them." Pet. App. at 10a. This is not so. Similarly, the Tribes' assertion that the District Court action "seeks an order which

will effectively divest the Tribes of any interest in the questioned lands and compel the Secretary to administer such lands as public lands rather than Indian lands" (Tr. Opp. Br. at 8) is also erroneous and misleading. The "trust status" of the federal lands involved is a voluntary servitude self imposed by the United States on its fee interests by the executive orders which created the three reservations. If the Secretary's boundary determinations are found to be erroneous, the United States clearly still retains the power to impose a trust status on the disputed lands. The State Parties would not and probably could not challenge a policy decision of the Secretary to add the disputed public lands to the reservations as Indian trust lands (assuming that he possesses statutory authority to do so) or the obvious power of Congress to declare them trust lands. All that they challenge is the Secretary's attempt to give the added lands a *retroactive* earlier *water* priority by a Procrustean "reinterpretation" of the controlling executive orders rather than having Congress simply add the lands to the reservations, in which event they would have a water priority junior to Metropolitan's. *Arizona II* at 641 (Cocopah Reservation).

Finally, the Ninth Circuit erroneously asserts that the State Parties challenge "the fundamental authority of the Secretary to establish reservation boundaries and to protect the property interests of Indian tribes. This [they] cannot do." Pet. App. at 10a. The State Parties make no such challenge. First, the Secretary presently has no authority to "establish reservation boundaries." Only Congress can do that. What the Secretary does possess is the authority and duty to interpret fairly and accurately statutes and exec-

utive orders creating Indian reservations in order to segregate them from the public lands by survey. That conceded authority is not challenged, only the way that it was unlawfully exercised in the case of the Fort Mojave Reservation for the reasons explicated by the District Court. Again, the court in *Pueblo of Taos* applied the proper analysis: "The gravamen of this action, however, is not a challenge to the authority of the Attorney General to issue the opinion he did, but rather is a request seeking this Court's judicial interpretation of the same matter presented to the Attorney General". 475 F.Supp. at 363-64 (footnote omitted).

Second, the State Parties do not challenge the basic authority of the Secretary "to protect the property interests of Indian tribes", but only his improper exercise of that authority in a manner that would unlawfully impair non-Indian rights under existing water delivery contracts. Once the reservation lands are properly segregated from the public lands the Secretary may freely carry out his trust responsibilities with respect to the Tribe's property interests in the reservation trust lands. In any event, the objective of the District Court action is by no stretch of the imagination to divest the United States of any of its ownership interests in the disputed area, whether public lands or lands held in trust for Indians, and it is only for such a title-divesting claim that Congress intended the QTA to be the exclusive remedy.

In summary, given the nature and background of the State Parties' boundary claims and considering that *Block* followed closely on the heels of *Arizona II*, this Court plainly understood that the claims were not of the "title divesting" character encompassed by

the QTA, or else the Court's direction that they be pursued in the District Court would have mandated an exercise in futility. This seems unlikely in light of the Court's urging of expeditious resolution of the boundary issues by the District Court, a goal that the Ninth Circuit seems to have gone out of its way to frustrate.

III. Even if the Quiet Title Act were applicable, the United States should be required to prove that there is at least a "substantial possibility" that the disputed lands are "trust or restricted Indian lands".

Even assuming that the Ninth Circuit's conclusion that the QTA applies to the District Court action were correct, whether the disputed lands qualify as "trust or restricted Indian lands" must still be determined. Relying on this Court's language in *Mottaz* that the Indian lands exemption applies when the United States "claims" such status for disputed lands, 106 S.Ct. at 2226, the United States argues that its mere pleading that the Secretary has already determined such status is enough. The Ninth Circuit agreed, thus in effect validating the very Secretarial decision under challenge. The United States was unsuccessful in a similar ploy to avoid the QTA sovereign immunity waiver before the Eighth Circuit, which held that the United States' bare *ipse dixit* before the district court that certain lands were "trust or restricted Indian lands" was not sufficient to invoke that exception to the QTA. Rather, it required that the United States "prove that there is a 'substantial' possibility that the lands in question are 'trust or restricted Indian lands' " and remanded for a determination of that issue *on the merits*:

> Because the district court did not address this issue, we reverse and remand for resolution of this issue on the merits. On the record before us, and without the benefit of findings or briefing on these issues, we can only determine that there may or may not be a substantial possibility that the Spaeths' lands are trust or restricted lands.

Spaeth v. United States Secretary of Interior, 757 F.2d 937, 943 (8th Cir. 1985) (emphasis added); *accord*, *United States v. Phillips*, 362 F.Supp. 462 (D. Neb. 1973). Senior Circuit Judge Henley's concurring opinion in *Spaeth* argued that the "substantial possibility" standard for determining whether the United States' claim was meritorious was too vague and that the district court should simply be directed to decide the jurisdictional issue on the merits (757 F.2d at 947):

> To me, this is simply a situation where the threshold jurisdictional issue is intertwined with the merits and must be decided. Either we have jurisdiction or we do not! If in deciding we also decide the merits, so be it.
>
> It is established that a court has jurisdiction to determine whether it has jurisdiction. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* §3536 (1984). As a corollary to this rule, "if the attack on jurisdiction requires the court to consider the merits of the case, the court has jurisdiction to proceed to a decision on the merits. [Citations omitted]."

The Ninth Circuit attempted to distinguish *Spaeth* as follows (Pet. App. 10a-11a (emphasis added)):

> This circuit's recent *Wildman* case puts at rest any possible argument that MWD might assert in this regard. "Nothing in the statute [QTA] or its history suggests that the United States was to be put to the burden of establishing its title when it has a *colorable claim* and has chosen to assert its immunity on behalf of land of which the Government declares that it is the trustee for Indians." *Id.* at 1309. The *Wildman* court goes on to state that "[s]overeign immunity, therefore, prevents the district court from exercising jurisdiction. The immunity of the government applies whether the government is right or wrong."

This simplistic interpretation runs counter to the basic objectives of the QTA and the modern Congressional trend, reflected in both that Act and the 1976 APA amendment, to make the Federal Government responsible for its actions. The basic issue is how a district court is to determine whether the United States has presented a "colorable claim". Here the Secretary's Fort Mojave and Colorado River boundary decisions simply implemented the legal theories which had been rejected by Special Master Rifkind in *Arizona I*, but left undecided by this Court. The *ex parte* manner in which those decisions were reached were condemned both by this Court in *Arizona II* and by the District Court below. Although neither court reached the merits of the Secretary's boundary interpretations, the State Parties' briefs before this Court in *Arizona II* show that they clearly violate well established canons of construction governing boundary descriptions. Consequently, against that background,

neither decision should carry any presumption of validity and cannot be considered a "colorable claim".

Similarly, the background of the Fort Yuma decision negates a presumption of its validity. The 25,000 acre boundary dispute on that reservation was initially resolved by Interior Department Solicitor Margold in 1936. His interpretation was the basis for the United States' claim in *Arizona I* and was not disputed by the State Parties. The Margold decision was reaffirmed by Solicitor Weinberg in 1968. However, the Tribes persuaded the Secretary to review the issue in 1975. After a full briefing and oral argument by all affected parties, including the State Parties, the Secretary reaffirmed the Margold opinion and had Solicitor Austin render a formal opinion on the issue. 84 I.D. 1 (1977). Nevertheless, the new Administration decided to review the matter again. After having assured the State Parties that they would be consulted and afforded an opportunity for a hearing if the Solicitor decided to reopen the issue, the Solicitor summarily reversed the *Austin* opinion on a completely *ex parte* basis and the Justice Department filed it the following day in support of its claim for additional water for the Quechan Tribe in *Arizona II*. Here again, such circumstances wholly negative any basis for a presumption of validity to the Secretary's decision.

Spaeth's approach is essentially the same as that followed by this Court before the 1976 amendment to the APA to determine whether an action against a federal official was barred by sovereign immunity. *See, e.g., Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962) (allegations that a federal officer exceeded his statutory authority or violated Constitutional safe-

guards so as to make suit one not against the sovereign requires determination of those issues on the merits); Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action; Some Conclusions from the Public Lands Cases*, 68 Mich. L. Rev. 867 (1970) (analyzing this Court's historic reluctance to recognize the sovereign immunity defense in public lands cases); *cf. Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 18, *reh'g denied* 296 U.S. 664 (1935) (Secretary's survey delineating federal lands from state-owned tidelands is not conclusive, since "question of jurisdiction, that is, of the competency of the Department to act upon the subject matter, is always one for judicial determination"); *Ritter v. Morton*, 513 F.2d 942, 946 (9th Cir.), *cert. denied* 423 U.S. 947 (1975) (recognizing that "in title dispute cases the issue of sovereign immunity and the ultimate merits of a plaintiff's claim are intimately interconnected"). The *Spaeth* rule is also similar to this Court's approach to determining whether a state has advanced a "colorable claim" in support of an Eleventh Amendment sovereign immunity defense. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). *Cf. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 56 U.S.L.W. 4292, 4301 (U.S. April 19, 1988) (where Indian tribes challenge federal land use action as impairing free exercise of their religion, "it is not enough to allege simply that the land in question is held sacred", but tribes must "show that the decision poses a substantial and realistic threat of frustrating their religious practices" (dissenting opinion)). This Court should require, at the minimum, a similar approach in order to prevent the United States from creating a massive loophole in the QTA by unilateral, *ex parte* boundary or other determi-

nations purporting to redesignate public lands as Indian trust lands.

In the absence of such a threshold procedure the potential for mischief, particularly in the West, is enormous. The United States owns 755 million acres of land, concentrated predominantly in the eleven Western States and Alaska where its lands comprise from 29 to 95 percent of all land in those states. *PLLRC Report*, note 9 *supra*, Ch. 1. Interspersed throughout those extensive federal landholdings (as well as state and privately owned lands based on public land patents) are some 44 million acres of Indian trust lands, most of which are located in formal reservations.[12] The original public land surveys were notoriously "rough", and the Secretary has long been authorized to conduct resurveys to properly delimit the public lands. Gates, *History of Public Land Law Development*, 420-21 (GPO 1968); Act of March 3, 1909, 43 U.S.C. §772; Piccone, *Resurveys of Public Lands*, 30 Rocky Mt. Min. Law Inst. 20-21 (1984). If such resurveys result in lands formerly designated as public lands being reclassified as Indian lands, property owners whose rights accrued on the basis of the original survey will be unable to challenge that redetermination, thus emasculating the careful protection afforded "bona fide claimants" under the proviso to the Secretary's resurvey authority under 43 U.S.C. §772. The long established right of such property claimants to assert their interests in a direct action against the Secretary challenging the survey (*Cragin v. Powell*, 128 U.S. 691 (1888)) will be gone. This

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[12] U.S. Dep't of the Interior, Bureau of Indian Affairs, *Annual Report of Indian Lands* (September 30, 1984) at 2-3.

outrageous result necessarily flows from the Ninth Circuit's earlier decision that the exclusive method for such claimants to enforce the rights guaranteed by that proviso is under the QTA (page 33 *supra*), coupled with its present decision that no affirmative relief at all is available under the QTA if the United States simply alleges that the reclassified lands are "trust or restricted Indian lands."

Nothing in the sparse legislative history of the Indian lands exemption supports the Ninth Circuit's conclusion. S. 216, as introduced, contained no such exclusion. The Interior Department's report on S. 216 recommended enactment of a Justice Department substitute bill and stated that it preferred the Justice Department's proposal because, *inter alia*, it would exempt trust or restricted Indian lands from its coverage (*Senate QTA hearings*, note 10 *supra*, at 2):

> Secondly, the Justice proposal specifically excludes lands held in trust for Indians and Indian restricted lands. The Federal government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States government. The Federal government has over the years made commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his Administration against abridging the historic relationship between the Federal government and the Indians without the consent of the Indians.

That position was repeated almost verbatim by the Interior Department's witness during Senate hearings on S. 216, but generated little discussion.[13] The Justice Department witness did not specifically address the issue. The Indian lands exemption was adopted and enacted with no consideration at all as to how such status would be established. However, no one even intimated that the mere claim of such status for particular lands would prevent a court from examining the merits of that claim. Consequently, it defies common sense to believe that Congress intended that the result reached by the Ninth Circuit would flow from enactment of a statute whose overriding purpose was to *remove* the bar of sovereign immunity from title disputes with the United States. Properly construed, along the lines of the Eighth Circuit's approach, the QTA does not produce that bizarre result.

IV. The Ninth Circuit's decision frustrates Congressional objectives to permit orderly Indian water rights adjudications in the Western States.

Section 1(a) of the QTA (28 U.S.C. §2409a(a)) provides that the Act applies only to title disputes over "real property in which the United States claims an interest, *other than* a security interest or *water rights*" and that it does not "apply to or affect actions

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[13] *Senate QTA hearings* at 19. One public witness stated that "I do not think anybody objects that Indian lands should be exempt" (*id.* at 36) while another commented that "[i]t is not clear to us why these lands were omitted from the effect of the [Justice Department] bill because the boundaries of restricted Indian lands are just as much of a problem as are other public lands or formerly public lands." *Id.* at 58.

which may be or could have been brought under . . . section 208 of the Act of July 10, 1952 (43 U.S.C. 666)" (emphasis added), the 1952 waiver of sovereign immunity with respect to general stream adjudications of water rights involving the United States (the McCarran Amendment) which this Court has held encompasses suits involving Indian water rights. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). The quoted language was proposed in a draft bill authored by the Justice Department, which explained that it "does not apply to civil actions . . . involving or relating to water rights." H.R. Rep. No. 1559, 92d Cong. 2d Sess. 10 (1972). The State Parties interpret section 1(a) as expressly preserving then existing law waiving sovereign immunity in the highly controversial field of western water rights adjudications. However, the United States' opposition to the State Parties' certiorari petition asserts, for the first time in this litigation, that the "QTA expressly *precludes* suits concerning the validity of 'water rights' ". U.S. Opp. Br. at 14, n. 6 (emphasis added). We believe that contention to be so obviously in error as to require no argument.

The QTA refers only to the McCarran Amendment as being unaffected by its provisions since it was the only legislative waiver of sovereign immunity for water rights litigation then in effect. Undoubtedly, if the 1976 APA sovereign immunity waiver had been law at the time the QTA would have also specified that legislation. In any event, the District Court suit below is clearly an action "involving or relating to water rights" inasmuch as the determination of an Indian reservation boundary is the essential first step

in the adjudication of the "practicably irrigable acreage" within the boundaries of an Indian reservation which is entitled to a *Winters* right. In essence the State Parties seek a *partial* adjudication of the essential elements of the water rights of the three reservations—the boundary portions. Moreover, it is plainly ancillary to the already completed comprehensive adjudication of all other Lower Colorado River water rights in California involved in *Arizona I*, which the Court of Appeals properly noted may satisfy the McCarran Act "streamwide adjudication" standard. Pet. App. at 11a.

The Ninth Circuit decision, if allowed to stand, will produce a highly deleterious impact on the already controversial area of Indian water rights adjudications in the West. At the time of enactment of the QTA a water right claimant wanting to contest a disputed boundary component of a *Winters* right claim for an Indian reservation had two options. He could participate in a general stream adjudication in which the disputed boundary would be tried and adjudicated in conjunction with the United States' *Winters* claim. If a general stream adjudication were not underway, the water rights claimant could attempt to litigate the validity of the contested *Winters* claim, including any underlying boundary disputes, in accordance with the criteria set forth in *Malone v. Bowdoin*, 369 U.S. 643 (1962). *See, e.g., Dugan v. Rank*, 372 U.S. 609 (1963). In that regard the State Parties note that although the District Court did not address the merits of the Secretary's interpretation of the Fort Mojave boundary description in the present case, it did find his order invalid as in excess of his statutory authority under 43 U.S.C. §772 and because of consti-

tutional due process infirmities, thus meeting both *Malone* criteria.

The amendment of the APA in 1976 waiving the doctrine of sovereign immunity in review of agency actions was intended to eliminate the need for the officer's suit fiction. In recognition of that purpose, the Ninth Circuit has already held that the APA waiver permits suits against federal officials with respect to actions affecting water rights because the McCarran Amendment did not make general stream adjudications the exclusive vehicle for resolving water rights claims, as this Court held in its *Colorado River Water Conservation District* and *San Carlos Apache Tribe* decisions, *supra*. *South Delta Water Agency v. United States*, 767 F.2d 531 (9th Cir. 1985); *accord*, *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987). Despite these holdings, the Ninth Circuit decision below holds, inconsistently, that a suit challenging Indian boundary determinations *solely* to determine water rights, not to divest the United States of any of its interests in land, is barred. Consequently, although aggrieved parties may now obtain APA review of federal agency actions adversely affecting their water rights, they may not do so if the agency action relates to an Indian reservation boundary determination or, indeed, to any action that would arguably impose an Indian trust status on the public lands affected by the agency action. Thus, if the Secretary redetermines the boundary of a wildlife refuge, national forest or any other kind of federal reservation, other than an Indian reservation, an aggrieved water user may challenge that action if he can show a threatened adverse impact on his rights resulting

from the increased amount of acreage entitled to an impliedly reserved water right. *See, e.g., United States v. New Mexico*, 438 U.S. 696 (1978). However, if the disputed boundary order segregates an Indian reservation from the public domain, the aggrieved water user will have no relief unless and until a streamwide adjudication is initiated and completed.

In summary, under the Ninth Circuit's decision the ironic result of (1) Congress' commendable attempt in the QTA to preserve existing law waiving sovereign immunity in water rights disputes and (2) Congress' later broad waiver of the sovereign immunity defense in the 1976 APA amendments has been to *narrow* water claimants' access to the courts where they seek review of a *Winters* claim involving a disputed Indian reservation boundary until a streamwide adjudication is completed. The absurdity of this retrogressive result demonstrates the basic fallacy of the Ninth Circuit's decision, and this Court should nip in the bud the confusion and inequity which the decision will inevitably cause in Indian water rights adjudications in the West.

V. The boundary disputes present justiciable controversies.

The Ninth Circuit offered its views, but not its formal decision, that "[t]here is a substantial question . . . .whether a suit initiated by Metropolitan at this time presents a case or controversy" (Pet. App. at 6a, note 3).

Even though the court found it unnecessary to decide the question, its discussion makes it clear that

it has not only reached a conclusion, but an erroneous one. Consequently, if the present sovereign immunity decision is overturned the Ninth Circuit will undoubtedly simply dismiss for lack of a case or controversy. Therefore a decision by this Court on that issue is necessary to prevent even further delay of the resolution of the boundary controversies.

The Ninth Circuit's analysis has at least two obvious flaws. First, Special Master Tuttle's recommended decision that the Secretary's orders were "final determinations" had no independent judicial status until acted upon by this Court. Second there is certainly no dispute that the Secretary's boundary orders were "final agency actions" subject to review, even though they did not constitute "final determinations" for purposes of further allocations of water under the decree in *Arizona I*. Although those boundary decisions *per se* have not yet caused an actual reduction in Metropolitan's supply under its water delivery contracts, they formed the basis for the United States' claim for additional water in *Arizona II* and have caused substantial uncertainty as to Metropolitan's legally available water supply in the near future and greatly complicated its planning efforts. Thus they clearly present the kind of "threatened injury" which is adequate to sustain jurisdiction under this Court's recent standing decisions abandoning any rigid requirement of "certainty" of injury to a more liberal "probability" of injury. Davis, 4 *Admin. Law Treatise* §24.12 (1983); *Bryant v. Yellen*, 447 U.S. 352 (1980). Similarly, the Secretarial orders are "ripe" for review even though they have not yet been applied to actually reduce Metropolitan's Colorado River water rights. *Abbott Laboratories v. Gardner*, 387 U.S.

136 (1967); Davis, 4 *Admin. Law Treatise* §§ 25.6-25.10 (1983). This is particularly true inasmuch as the Fort Mojave Tribe is currently diverting and using substantial quantities of water on the disputed area on that reservation and the Colorado River Tribes have recently circulated for public comment a land use development plan for the disputed area on that reservation. In any event, this Court's decision in *Arizona II* that the District Court hear the boundary disputes should be dispositive of this issue.

CONCLUSION

The Ninth Circuit's decision should be reversed and the interlocutory appeals vacated as moot concurrently with the entry of an order under the decree in *Arizona v. California* appointing District Judge Brewster special master and directing him to conclude his review of the boundary issues as expeditiously as possible and to submit a recommended decision to the Court.

In the alternative, the action should be remanded to the Ninth Circuit with directions to expedite a decision on the merits of the interlocutory appeals pending before that court. If this alternative is followed, the Court's decision should make it clear that the three boundary disputes present justiciable cases or controversies.

Respectfully submitted,

WARREN J. ABBOTT, *General Counsel*
FRED VENDIG, *Assistant General Counsel*
KAREN L. TACHIKI, *Deputy General Counsel*
JAMES F. ROBERTS, *Deputy General Counsel*
THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

JEROME C. MUYS
Counsel of Record
THOMAS W. WILCOX
WILL & MUYS
1825 Eye Street, N.W., Suite 920
Washington, D.C. 20006
(202) 429-4344

Attorneys for The Metropolitan Water District of Southern California

JUSTIN MCCARTHY
REDWINE & SHERRILL
1950 Market Street
Riverside, California 92501
(714) 684-2520

Attorney for Coachella Valley Water District

JOHN K. VAN DE KAMP, *Attorney General of the State of California*
R. H. CONNETT,
N. GREGORY TAYLOR,
Assistant Attorneys General
DOUGLAS B. NOBLE,
Deputy Attorney General
3580 Wilshire Boulevard, Suite 600
Los Angeles, California 90010

Attorneys for the State of California

ROBERT K. CORBIN, *Attorney General*
ANTHONY B. CHING, *Solicitor General*
1275 West Washington Street
Phoenix, Arizona 85007

Attorneys for the State of Arizona

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APPENDIX

APPENDIX

QUESTION: Well, Mr. Claiborne, what is your—the United States' position in these other forums? Are you taking the position that the Secretary's proceedings are open to review, or are you moving to dismiss for want of jurisdiction, or on sovereign immunity grounds?

MR. CLAIBORNE: Justice White, as was correctly stated, I think, by Mr. Boronkay, the United States has in the proceeding filed in the Southern District of California submitted a motion to dismiss alleging—

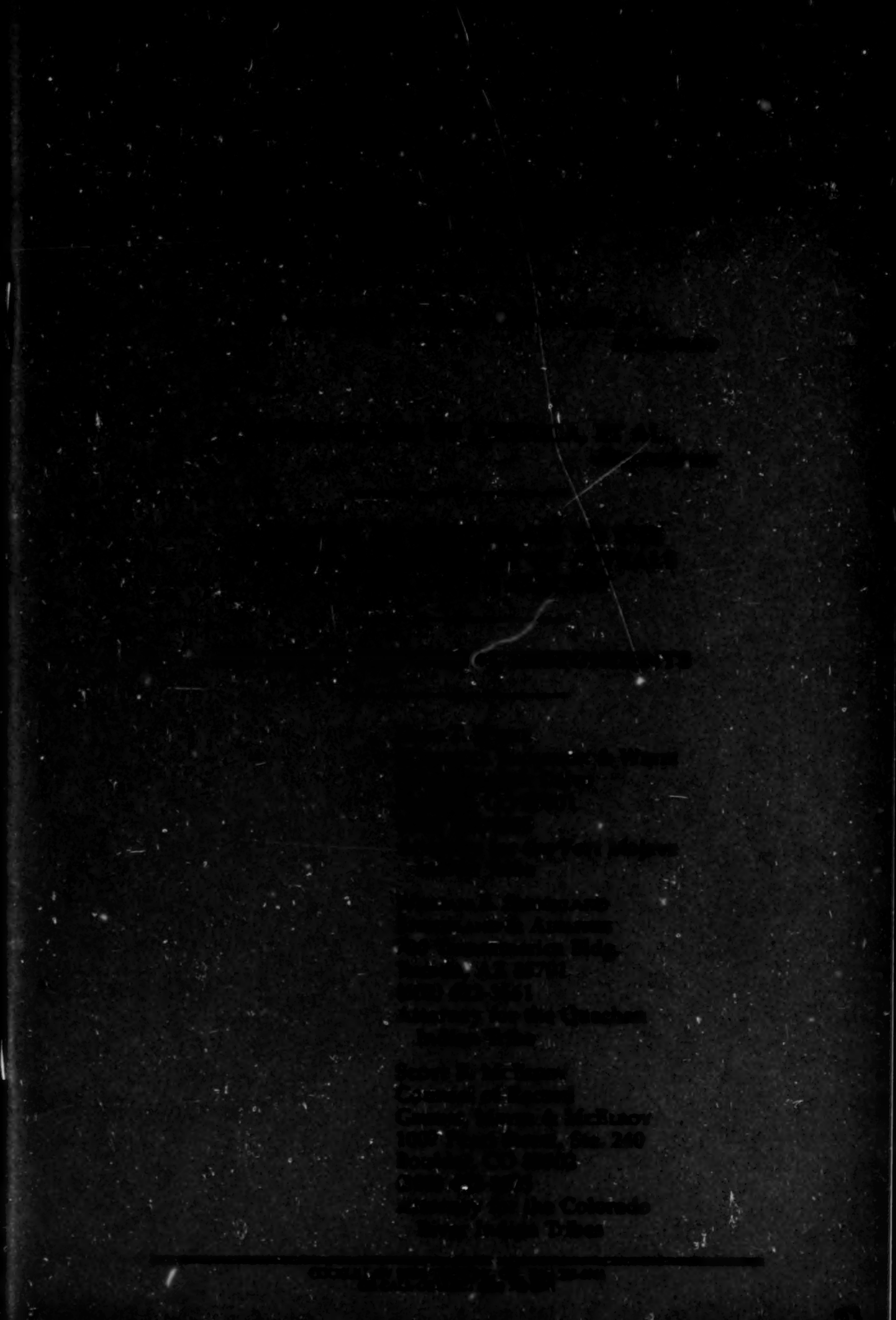
QUESTION: So you are saying—your position is that these determinations are not subject to review anywhere, here or in another forum.

MR. CLAIBORNE: I hope I do not have to—I disown the motion to dismiss which has been filed by the United States in the district court. Whether that—all of those defenses or some of them will prevail in that court is something—

QUESTION: Well, suppose they had prevailed. Would you still take the same position here?

MR. CLAIBORNE: Yes, we would. And—we would, assuming that that decision had survived appeal or had not been appealed, and had sustained our motion to dismiss, we would rest on the correctness of that ruling, and there is much law to the effect that—

Transcript of Oral Argument, *Arizona II* (December 8, 1982) at 61-62.



QUESTIONS PRESENTED

(1) Whether the States of Arizona and California and public agencies of the State of California who are before this Court in *Arizona v. California*, 373 U.S. 546 (1963), 460 U.S. 605 (1983), may invoke the jurisdiction of the federal district court under the Administrative Procedure Act, 5 U.S.C. § 702, to challenge the United States' claim that it holds lands in trust for the benefit of Indian tribes in light of Congress' express refusal in the Quiet Title Act, 28 U.S.C. § 2409a, to waive the sovereign immunity of the United States in suits to adjudicate disputed title to "trust or restricted Indian lands" and the APA's express provision that it does not authorize suit if "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

(2) Whether the United States' intervention and waiver of immunity in *Arizona v. California* extends to an entirely separate federal district court action brought by state agencies against the United States to challenge the United States' claim that it holds lands in trust for the benefit of an Indian tribe.

(3) Whether in order to invoke the "Indian lands exception" to the Quiet Title Act, the United States must demonstrate a "substantial possibility" that the lands in question are trust or restricted Indian lands.

LIST OF PARTIES

The parties to the proceedings below were:

Petitioners the State of California, the State of Arizona, the Metropolitan Water District of Southern California and the Coachella Valley Water District.

Respondents the United States of America, Donald P. Hodel, the Secretary of the Interior, the Quechan Indian Tribe, the Fort Mojave Indian Tribe and the Colorado River Indian Tribes.

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No. 87-1165

In The

Supreme Court of the United States

October Term, 1987

THE STATE OF CALIFORNIA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE TRIBAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported as *Metropolitan Water District of Southern California v. United States,* at 830 F.2d 139 (9th Cir. 1987). The opinion of the district court (Pet. App. 12a) is reported as *Metropolitan Water District of Southern California v. United States,* at 628 F. Supp. 1018 (S.D. Cal. 1986).

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1987, and the petition for a writ of certiorari was filed on January 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

(1) Administrative Procedure Act, 5 U.S.C. § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(2) Quiet Title Act, 28 U.S.C. § 2409a

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or

water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under section 208 of the Act of July 10, 1952 (43 U.S.C. § 666).

(3) McCarran Amendment, 43 U.S.C. § 666

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. . . .

STATEMENT OF THE CASE

This action concerns the lingering boundary disputes arising from the water rights proceeding in *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona v. California I*) and *Arizona v. California*, 460 U.S. 605 (1983) (*Arizona v. California II*). At issue is the validity of three orders issued by the Secretary of the Interior establishing portions of the boundaries of the Fort Mojave, Colorado River, and Fort Yuma (Quechan) Indian Reservations. The Secretary's orders directed that portions of the Reservation boundaries be resurveyed with the result that additional lands were included within the original reservation boundaries. The lands affected were formerly held as public lands and are now held in trust for the benefit of the Tribes. Petitioners, the Metropolitan Water District of Southern California, the Coachella Valley Water District, the State of Arizona and the State of California (hereinafter "the State Parties") are parties to the *Arizona v. California* proceedings and are attempting to use this action as a vehicle to challenge the Secretary's boundary orders.

Thus far, the only Secretarial order that has been directly addressed in this litigation is the order affecting the Fort Mojave Reservation boundary. That order, issued in 1974 by Secretary Rogers C. B. Morton, directed a resurvey of the "Hay and Wood" portion of the Fort Mojave Reservation (hereinafter "the Reserve"). Secretary Morton was attempting to resolve a longstanding dispute within the Interior Department as to the correct location of the Reserve's western boundary. *Report*, Special Master Elbert P. Tuttle, No. 8, 58-59 (Feb. 22, 1982). (Hereinafter "Tuttle Report"). The source of the dispute was the original survey of the Reserve conducted in 1869 by Lt. George Wheeler which contained conflicting survey calls.[1] The survey's legal description referred to posts "near the left bank of the Colorado River" and, at the same time, set out courses, distances and acreage describing the Reserve as containing "9114.81 acres more or less".[2] If the courses, distances and acreage are followed,

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[1] Wheeler's original purpose was to establish the boundaries of a U.S. Military Post which was formally established by Executive Order in 1870. In 1890, the Post was made part of the Fort Mojave Indian Reservation by Executive Order and the Wheeler plat, and legal description, were adopted to describe this new portion of the Fort Mojave Indian Reservation. The Hay and Wood Reserve (an area used for growing hay and wood) was a part of the Post. (Pet. App. 14a).

[2] A copy of the 1870 Executive Order is Exhibit 4 to the Second Amended Compliant and is reproduced on pages 65-71 of the Excerpts of Record before the United States Court of Appeals for the Ninth Circuit. Hereinafter, all references to the Excerpts of Record will be to "E.R. ___". References to other documents will be to the Trial Court Docket Number, "N.R.".

the western boundary of the Reserve is located west of the 1869 River up into the foothills. On the other hand, setting the western boundary at the River as it existed in 1869 creates a Reserve of 5,614 acres.

Secretary Morton resolved the conflict by deciding that the correct location of the Reserve was according to the courses, distances and acreage, making the Reserve the full 9114.81 acres. He vacated a prior resurvey of 1928 and stated that the western boundary is "most accurately determined and established in accordance with the intent of the original survey by using the courses, distances and acreage as described in the plats and notes of the survey." E.R. 75.[3] In compliance with the federal resurvey statute (43 U.S.C. § 772) the Secretary provided for the protection of "third-party interests" owning "lands inside the now recognized boundary of the reservation". E.R. 76.[4]

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[3] The Secretary's decision was based upon consideration of a memorandum of that same date submitted by the Solicitor of the Department of the Interior and three memoranda submitted by the Associate Solicitor for Indian Affairs. Attorneys representing the Bureau of Land Management participated in the decision-making process. E.R. 77-78.

[4] Third parties within the surveyed area were in fact notified. Protests were then made by alleged patentees of land within the disputed area. These objections were overruled and the final plat was approved and filed on November 6, 1978. Memorandum and Report on preliminary Matters, Special Master Elbert P. Tuttle, No. 8. p. 33 (August 28, 1979). Metropolitan was not formally notified of the resurvey since, as it concedes (Pet. Br. at 10), it claims no lands or title interest to the resurveyed lands.

Following the Secretary's decision, the Tribe executed a twenty-five year lease with Russell Brothers Ranch, Inc. to farm and develop the lands added to the Reservation by the resurvey. N.R. 154. In reliance upon the lease, Russell Brothers cleared and leveled the lands and installed an irrigation system and drainage facilities. The improvements are valued at more than $2,800,000. N.R. 154.[5]

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[5] The boundary dispute at the Colorado River Indian Reservation involves interpretation of an Executive Order issued on May 15, 1876, which modified the Reservation boundaries as originally established by the Act of March 3, 1865 (13 Stat. 541, 559), by describing one of the boundaries as "the west bank of the Colorado River." The dispute concerns whether the boundary along the "west bank of the Colorado River" is a fixed line as established in 1876 or a moving line subject to the rules of accretion and avulsion when the River changes its course. On January 17, 1969, the Secretary, relying upon an opinion from the Solicitor, issued an order directing that approximately the northerly two-thirds of the disputed boundary was to follow a fixed line and not the changing River. Since that time, the United States has obtained final judgments quieting title in the Tribes for various parcels added to the Reservation. *Arizona v. California II*, 460 U.S. at 636n.26.

The Fort Yuma Reservation boundary dispute centers on interpretation of a cession agreement entered into between the Quechan Tribe and the United States and ratified by statute in 1894, 28 Stat. 332. The 1893 agreement provided for the allotment of irrigable lands, the sale of surplus irrigable lands under certain prescribed conditions, the holding of sales proceeds in trust for the Tribe and the allotment of nonirrigable acres to settlement under the general laws of the United States. The Department of the Interior had previously rejected the Tribe's claims to reservation boundaries which included the

(Continued on following page)

The present action was filed on July 21, 1981, by the Metropolitan Water District of Southern California and the Coachella Valley Water District (hereinafter "Metropolitan") seeking review and invalidation of the orders under the Administrative Procedure Act, 5 U.S.C. § 706. The complaint seeks a declaration that the orders are "void" and an injunction setting them aside. Metropolitan's complaint, as amended, also seeks a judicial determination of the location of the boundaries "for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act" (43 U.S.C. § 617-619) and to protect its rights which "may be reduced in the future by valid Indian reservation diversions." E.R. 17.[6]

Metropolitan's concern at the time was that the recognition of additional reservation lands with present perfected water rights would reduce the amount of water

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land ceded by the 1893 agreement. On December 20, 1978, the Secretary issued an order declaring the 1896 cession agreement and the 1894 ratifying statute of no effect, due to the failure of the United S. tes to fulfill the conditions of the 1893 agreement.

[6] The original complaint named only the Secretary of the Interior as party defendant. N.R. 1. Subsequently, the court granted leave for the States of Arizona and California to be added as defendants. N.R. 96, 97 and 108. Thereafter the three Tribes were granted permission to intervene in the action. N.R. 43, 75 and 98.

available from the Colorado River to meet its requirements. This is because the Tribes' rights to use Colorado River water are senior to Metropolitan's contract rights.

The Tribes' water rights, as established in *Arizona v. California*, are " present perfected rights". *Arizona v. California*, Decree, 376 U.S. 340 (1964). Pursuant to stipulation with the other parties, including Metropolitan, the Tribes' rights are to be satisfied first in times of shortage, except for a small number of miscellaneous water rights. Rights totaling 120,060 acre-feet of water were awarded for the three Reservations to be charged to the California allocation under the 1964 Decree. *Arizona v. California*, Supplemental Decree, 439 U.S. 419 (1979).

Metropolitan's water rights, on the other hand, are the fourth and fifth priorities among California diverters, and are limited by the terms of Metropolitan's water delivery contract with the Secretary of the Interior.[7] Under the fourth priority, Metropolitan is entitled to receive 550,000 acre-feet per year. The fifth priority entitles it to divert 662,000 acre-feet on an annual basis.

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[7] Metropolitan is a public corporation established under California law that engages in the storage and delivery of water within the state for municipal and domestic uses. E.R. 2-3. A portion of Metropolitan's water supply is obtained from the Colorado River, pursuant to a water delivery contract executed with the Secretary of the Interior in 1930, and amended in 1931. The water contract was executed under the Boulder Canyon Project Act, 43 U.S.C. § 617, which charges the Secretary with responsibility for allocating water from the River pursuant to contracts. *See Arizona v. California I*, 373 U.S. at 580.

Metropolitan's concern, however, is that California is limited to 4.4 million acre-feet of Colorado River water per year, plus one-half of any surplus; and the three priorities ahead of Metropolitan are entitled to divert 3.85 million acre-feet annually. Thus, whenever California is limited to 4.4 million acre-feet, Metropolitan is limited to a diversion of 550,000 acre-feet, less any tribal diversions.

When Metropolitan filed its complaint in this case, Special Master Tuttle had recommended that the three Secretarial orders be treated as "final determinations" of the reservation boundaries within the meaning of this Court's decree in *Arizona v. California*. Thus, in the Special Master's view, the Tribes should have been entitled, on a conditional basis, to additional water rights for the lands in question if any of those lands were "practicably irrigable".[8] The Special Master made clear, however, that his recommended award would be subject to any future litigation brought by "some interested party." Tuttle Report p. 64.

The Court refused to award water rights to the Tribes based upon Special Master Tuttle's recommendation. The Court stated:

> In our 1963 opinion, when we set aside Master Rifkind's boundary determinations as unnecessary and referred to possible future final settlement, we in

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[8] The Special Master determined that the practicably irrigable acreage included 2,000 acres within the Fort Mojave Hay and Wood area, approximately 3,500 acres within the Colorado River Reservation area; and approximately 5,800 acres within the disputed Fort Yuma (Quechan) area.

> no way intended that *ex parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies, or private water users holding priority rights.

460 U.S. at 636. The Court, however, also disagreed with Metropolitan's assertion that the boundary issues should be resolved within the *Arizona v. California* proceedings. Referring to its 1963 opinion, the Court stated:

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums.

460 U.S. at 638.

This action was pending at the time of the 1983 opinion, and was referred to as a possible "other forum." In an often quoted passage the Court referred specifically to this action:

> At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes.

460 U.S. at 638. It was plainly recognized, however, that certain jurisdictional challenges had been asserted, which might foreclose adjudication of the boundaries in this case:

> We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court. If the litigation goes forward and is concluded, there will then also be time enough to determine the impact of the judgment on our outstanding decree with respect to Indian reservation water rights.

460 U.S. at 638. The Court urged that the district court litigation be "expeditiously adjudicated." 460 U.S. at 639.

Nearly five years have passed since the Court's decision and the litigation has proceeded in anything but an expeditious fashion. In 1984, the district court proceeded under the Supreme Court's directive (N.R. 43) and the parties agreed by stipulation to address the boundary issues at the Fort Mojave Indian Reservation first. N.R. 116. The State Parties, the United States, and the Fort Mojave Indian Tribe joined in motions for partial summary judgment. The Tribe's motion requested that Secretary Morton's June 3, 1974, order be affirmed under the "arbitrary, capricious, an abuse of discretion" standard of the APA, 5 U.S.C. § 706(2)(A), based upon the administrative record.[9] Metropolitan, joined by the States of California and Arizona, argued that the Secretary's order should be struck down under the APA based upon a *de novo* review of a number of documents outside of the administrative record. N.R. 131 and 133. Metropolitan, the State of California and the State of Arizona differed, however,

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[9] This position was not arrived at easily since it is well established that public and Indian land resurvey decisions are generally unreviewable. *See Report*, Special Master Simon H. Rifkind, *Arizona v. California*, No. 8, pp. 284-85 (December 5, 1960); Tuttle Report, pp. 68-73. Nevertheless, because of the need to have the boundaries decided, the Tribes asserted that position.

in their positions respecting the proper new location of the Reserve.[10]

In December of 1984, the district court heard three days of oral argument on the respective motions. At this hearing, Judge Brewster raised previously unasserted concerns as to whether Metropolitan was entitled to protection as a "bona fide claimant" under the resurvey statute, 43 U.S.C. § 772, and Metropolitan's right to a hearing prior to the Secretarial order. The court ordered supplemental briefing on these issues. N.R. 156.[11]

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[10] Metropolitan advocated alternative locations of the Hay and Wood Reserve. One location (the one that is stated in its complaint) asserts that the western boundary is "the left bank of the Colorado River in its last natural course." E.R. 21-22. The other location would shift, not only the western boundary of the Reserve, but the entire Reserve several miles to the south and east so that the reserve would be located entirely within the State of Arizona. Under this theory the Reserve would contain the full 9,114.81 acres. N.R. 131.

The State of California advocated the "last natural channel" theory. N.R. 126-127. The State of Arizona's only position has been to advocate against Metropolitan's theory that would shift the reserve entirely into Arizona. N.R. 148.

[11] In its supplemental briefs Metropolitan asserted that it was entitled to protection as a "claimant" under 43 U.S.C. § 772 and that its property interests entitled it to a hearing before the Secretary had issued his order. N.R. 159. It candidly stated, however, that the Secretary has "broad authority" to resurvey public lands and that it did not object to the addition of public lands to the Reservation, only the attempt to make the addition retroactive. Metropolitan further took note of the unusual nature of its action.

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Nine months after supplemental briefs were filed, the district court issued its decision. Finding that the resurvey statute's provision protects "the entire spectrum of rights of claimants", the court held that the Secretary "lacks authority to relocate the instant boundaries." (Pet. App. at 19a-20a). The court ordered a *de novo* determination of the Fort Mojave Hay and Wood boundary upon this ground. (Pet. App. at 20a). As an alternative holding, the court found that even if the Secretary possessed authority, that the Secretary's order was deficient under due process standards. Pursuant to section 706(2)(D) of the APA, prohibiting agency action "without observance of procedure required by law" the court voided the order.

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> [I]t takes a judicial determination to make the boundary change in question binding on Metropolitan. Although the United States has the burden of initiating such proceedings, *we are willing to use this case as the judicial vehicle* to determine the two phases: (a) where is the boundary, and (b) whether it is binding on Metropolitan's water rights.

N.R. 159, p.3. Metropolitan further stated "this action is most appropriately viewed *as an action by the Secretary* seeking validation of his order and subsequent resurvey." N.R. 159, p.3.

The Tribes' supplemental briefs also commented on the unusual nature of this action. It was pointed out that Interior Department's public land surveys and resurveys are committed to the discretion of the Secretary and, as such, they are generally unreviewable. If they are reviewable, the standard would have to be the "abuse of discretion" standard in 5 U.S.C. § 706(2)(A). N.R. 162.

Under this ground, the court held that it was also authorized to make a *de novo* determination of the boundaries.[12]

The Tribes and the United States thereafter appealed pursuant to 28 U.S.C. § 1292(b). On appeal, the Tribes challenged the district court's rulings with respect to the scope of review under the APA, and the protection afforded under the bona fide claimant provision of the resurvey statute. In addition, the Tribes raised, for the first time, the issue of the district court's jurisdiction in light of the Quiet Title Act, 28 U.S.C. § 2409a and recent decisions construing that Act.[13]

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[12] The district court made clear, however, that it was not ruling on the merits of the parties' positions.

> The court finds that there is a lively dispute as to the boundaries and acreage intended by the United States when it established the Reserve. As a guide to the parties, the court notes that it is not as convinced as the parties appear to be that the boundaries actually surveyed by Lieutenant Wheeler are determinative of the intent of the grantor. In later proceedings, the parties should be prepared to address whose intent constitutes the intent of the grantor. For instance, the intent of those giving instructions to Wheeler may be more probative of the intent of the grantor than Wheeler's intent. In any event, the conflicting evidence regarding the intent of the grantor precludes summary judgment at this point. The court believes that a trial will be necessary to resolve this factual dispute.

(Pet. App. 25a-26a).

[13] See Fadem v. United States, 791 F.2d 1381 (9th Cir. 1986); Florida Dep't of Business Regulation v. United States Dep't of the Interior, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); United States v. Mottaz, 476 U.S. 834 (1986).

The Ninth Circuit, in a *per curiam* opinion, addressed only the jurisdictional issue. It held that Metropolitan's action was barred under the Quiet Title Act, 28 U.S.C. § 2409a, since the successful assertion of its claim would "quiet title in others than the Tribe." (Pet. App. at 9a). Relying upon its recent decision in *Wildman v. United States*, 827 F.2d 1306 (9th Cir. 1987), the circuit court rejected the argument that the United States must establish its title to the lands before invoking the Quiet Title Act. The court further rejected Metropolitan's arguments that the United States had waived its immunity through participation in the *Arizona v. California* proceedings. Noting that the boundary issues were not litigated in the Supreme Court, the Ninth Circuit stated: "An application to the Supreme Court under a continuing decree for a reallocation of water rights cannot be viewed, under any stretch of the imagination, as consent by the Secretary to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation boundaries." (Pet. App. at 8a) (Footnote omitted). Finally the court rejected Metropolitan's contention that the McCarran Amendment, 43 U.S.C. § 666, could be viewed as a waiver of the United States' sovereign immunity since this litigation, at most, addressed only a preliminary issue to the determination of the relative rights of certain of the competing claimants to water from the Colorado River. (Pet. App. at 11a).[14]

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[14] The court also questioned whether Metropolitan's suit presents a case or controversy since Metropolitan's water rights are not threatened so long as the boundary orders are not deemed to be final determinations. (Pet. App. at 6a).

SUMMARY OF THE ARGUMENT

1. The United States' waiver of immunity through its intervention and participation in *Arizona v. California* does not extend to the present, entirely separate cause of action challenging title to the Reservation boundaries. The State Parties concede that no case authority directly supports this position. The only authorities cited all involve a waiver by the United States when a counterclaim is asserted in the same action. The present case does not involve a counterclaim. The United States' intervention in the *Arizona v. California* did nothing more than subject the federal government to the jurisdiction of this Court in that separate proceeding. There must be a separate waiver of immunity to support the present action. This requirement is supported by public policy since adoption of the State Parties' position would lead to piecemeal adjudication of federal water rights. Finally, there is not even a need to adopt such a rule in the present case. The State Parties' interests are protected in the Court's decree in *Arizona v. California*, and the Tribes cannot increase their water rights without an adjudication of the boundaries that includes the State Parties.

2. The United States has not waived its immunity from suit for the present boundary challenges in the Administrative Procedure Act. The waiver under 5 U.S.C. § 702 is limited by a provision that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The Quiet Title Act is an "other statute" that expressly forbids the relief being sought. In this case, if the relief being sought is granted the Tribes would lose more than 30,000 acres of

their reservation lands. The severed lands would still be held in fee by the United States as public lands, but that is of little consolidation to the Tribes since they would lose their entire interest in the lands.

The waiver of immunity provision in 5 U.S.C. § 702 is not the general "catchall" provision that the State Parties assume. The provision makes clear on its face that it was not intended to supplant other statutes such as the QTA, limiting judicial challenges to federal government actions. This view is supported by the legislative history of Section 702 and this Court's decision in *Block v. North Dakota*, 461 U.S. 273 (1983).

It does not matter that the State Parties do not seek to quiet title in their own name. The complaint plainly seeks to determine if the lands are held in trust for the Tribes and will quiet title "in others" as the court of appeals found. There is nothing in the QTA, or its legislative history, to suggest that it applies only when a party seeks to quiet title in the traditional sense. To the contrary, the Eleventh Circuit held in *State of Florida v. U.S. Department of Interior*, 768 F.2d 1248 (11th Cir. 1985) cert. denied 475 U.S. 1011 (1986) that such a reading would effectively nullify the "Indian lands exception" in the QTA.

Nor does it matter that, even if successful, this litigation would not totally divest the United States' title. This Court in *United States v. Mottaz*, 476 U.S. 834 (1986), applied the QTA under similar circumstances where the relief sought would have returned the land to trust status and not divest the United States of the underlying fee.

The Indian lands exception applies in this case. As interpreted by this Court, the exception retains the

United States' immunity in actions "by third parties *challenging the United States' title to lands held in trust for Indians.*" *United States v. Mottaz, supra,* 476 U.S. at 842 (emphasis added). As stated by the Court, "when the United States *claims an interest* in the real property based upon the property's status as trust or restricted Indian lands," the QTA does not waive the Government's immunity. *Id.* at 843 (emphasis added). No one disputes that the lands in question here are claimed by the United States based upon their status as trust or restricted Indian lands.

Finally, there is no requirement that the United States and Tribes must demonstrate a "substantial possibility" that the disputed lands are in fact Indian lands before invoking the sovereign immunity of the United States to foreclosure suit. The language of the QTA intimates no such test. While allowing the United States to be named as a party defendant, nothing in the exception regarding Indian lands or its history suggests that the United States' immunity was waived in order to test the validity of its claim before invoking the Indian lands exception to the waiver of immunity in the QTA.

ARGUMENT

I. THE UNITED STATES HAS NOT WAIVED ITS IMMUNITY FROM SUIT FOR THIS BOUNDARY ACTION BY ITS INTERVENTION AND PARTICIPATION IN THE SEPARATE *ARIZONA V. CALIFORNIA* PROCEEDINGS.

The State Parties contend that the assertion of reserved water rights by the United States in the *Arizona v. California* proceeding brought under the original jurisdiction of this Court (U.S. Const. Art. III and 28 U.S.C. § 1251) waives the government's sovereign immunity in this entirely separate cause of action brought under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Federal Question Statute, 28 U.S.C. § 1331.

There is absolutely no support for this novel contention.[15] As the State Parties concede, no court has ever sanctioned a shifting of a waiver of the government's immunity from one action to another. The several cases that are cited all involved waivers of the United States' immunity for counterclaims in the same action. *United States v. Norwegian Barque "Thekla"*, 266 U.S. 328 (1924); *United States v. Taunah*, 730 F.2d 1360 (10th Cir. 1984); *Jones v. Watts*, 142 F.2d 575 (5th Cir. 1944); and *United States v. Martin*, 267 F.2d 764 (10th Cir. 1959). The cases do not even remotely support the States Parties' contention that the United States' waiver in *Arizona v.*

[15] Indeed, the State Parties candidly admit that the issue is of "first impression" (Pet. Br. at 18), that they "have found no case" to support this proposition (Pet. Br. at 19), that "Congress has not expressly so provided" (Pet. Br. at 23); and that it "would be without direct precedent" (Pet. Br. at 23).

California can be extended to this entirely separate action. The present action is simply not a counterclaim.[16]

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[16] In *Thekla*, the United States was suing the owners of the Thekla for damages arising out of a collision with an army transport ship the Luckenbach. The owners of the Thekla thereafter filed a cross-libel or cross-claim against the United States alleging that the Luckenbach was at fault for the collision. The United States interposed a defense of sovereign immunity. This Court rejected the Government's defense finding that when the United States "joined in the suit" it "carried with it the acceptance of what liability the courts may decide to be reasonably incidental to that act." 266 U.S. at 341. In other words, when the United States files an action it is subject to counterclaims involving that subject matter.

In *United States v. Taunah*, the United States brought a quiet title on behalf of certain Indian allottees concerning a tract of land. Defendants were family members who also claimed title to the lands. They asserted a counterclaim for equitable relief to which the United States asserted its sovereign immunity. In rejecting this defense the court stated:

> This is no more nor less than a family dispute. The Government chose one side and sues on behalf of that side. The real plaintiff is not the United States, but one group of heirs. We see no reason why the *small exception* to the immunity doctrine should not be applied *to permit the counterclaim* to be asserted as a lien and so not to venture outside the subject of the original cause of action.

730 F.2d at 1362 (emphasis added). The *Taunah* case, therefore, only supports a waiver for a counterclaim within the very same action.

Jones v. Watts is similarly not supportive of the State Parties' position. In that case, the United States had instituted an action to enforce a money judgment after an alleged default. The defendant filed a separate action against the United States

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In effect, the State Parties are seeking to imply a waiver of the United States' immunity where no express congressional waiver can be found. This, of course, is prohibited. As this Court has held on numerous occasions, a waiver of sovereign immunity "cannot be implied but must be unequivocably expressed." *United States v. King*, 395 U.S. 1, 4 (1969); *United States v. Mitchell*, 445 U.S. 535, 538 (1980), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978), *United States v. Testan*, 424 U.S. 392, 399 (1976). If the State Parties are to find a waiver, they must look to express legislation. As discussed *infra* at pp. 28-45, there is no such express waiver to be found.

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seeking to have the judgment set aside on the basis that there was no personal service to which the United States asserted its sovereign immunity. The court in *Jones* agreed and affirmed dismissal of that separate action. It went on to say that the defendant might have a possible remedy against the United States, but that could be in the original enforcement action through a motion to quash the execution of the judgment.

The State Parties' reliance upon *United States v. Martin*, is similarly misplaced. In *Martin* the United States had filed a declaratory class action for an adjudication of water rights to the Colorado River arising out of the Big Thompson project. The defendants were landowners and water users who claimed an interest in the project waters. Those defendants filed an answer and counterclaim alleging that the Secretary of the Interior's actions through operation of the project were harming their water uses. The Secretary moved to dismiss the counterclaim on grounds of sovereign immunity. The court rejected the defense, finding that "when the United States institutes a suit" it consents to the "adjudication of all matters and issues which are reasonably incident thereto" that are raised by the counterclaim. 276 F.2d at 769.

There is also no support for the State Parties' proposition in this Court's opinion in *Arizona v. California II.* The Court pointed to this action as a possible "available and suitable forum" to settle the boundary disputes. 460 U.S. at 638. But, the Court specifically acknowledged the possibility that jurisdictional barriers may prevent the action from going forward. *See* 460 U.S. at 638. Indeed, the Court referred to the sovereign immunity defense presently being asserted. The Court clearly did not find that the United States had waived its sovereign immunity. Otherwise the Court would not have stated that "if any of these grounds for dismissal [standing, indispensable parties, sovereign immunity, statute of limitations] are sustained," " there will be time enough" to determine whether they are "nevertheless open for litigation in this Court". 460 U.S. at 638. The Court appears to have anticipated the possibility that the United States might successfully assert its sovereign immunity in the pending district court action.[17]

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[17] The United States did not, and could not, waive its immunity by statement to this Court or in the district court. The State Parties have taken Mr. Claiborne's "disownment" comment entirely out of context (Pet. Br. at 11). As the full text of the exchange reveals (App. 1a), Mr. Claiborne was merely saying that he was not responsible for the filing of the motion. He even stated that if the motion were successful that "we would rest on the correctness of that ruling." (App. 1a). This is hardly an abandonment of the defense.

Similarly, the United States' Amended Motion to Dismiss in the district court did not waive the government's immunity. The federal government is not subject to waiver or estoppel

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The United States' intervention and participation in *Arizona v. California* did nothing more than subject the federal government to the jurisdiction of this Court in that case. In *Arizona v. California* the United States presumably waived its immunity with respect to the resolution of the boundary issues. But that waiver only applied within the *Arizona v. California* proceeding and cannot be transferred to an entirely separate action. This Court has never interpreted its original jurisdiction to have such a broad application. To the contrary, the Court has consistently construed its jurisdiction "sparingly" (*United States v. Nevada,* 412 U.S. 534, 538 (1973)) and whenever it has referred to the possibility of issues being decided in other forums, it has made it clear that the other forum must be one "where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Maryland v. Louisiana,* 451 U.S. 725, 740 (1981), quoting *Illinois v. City of Milwaukee,* 406 U.S. 91, 93 (1972). In short, there must be a separate jurisdictional basis for the issues to be decided in a separate forum.[18]

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when it asserts the defense of lack of jurisdiction. More significantly, the United States' Amended Motion to Dismiss did not even purport to withdraw objections to challenges to title to the lands. The amendment only purported to withdraw the government's objections where "the legal title to the lands is not at issue." N.R. 37. Clearly in this case the legal title to the property is at issue.

[18] There is no analogy to this case and the principle of derivative jurisdiction for removal or to the principles of

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The requirement for a separate jurisdictional basis is supported by public policy. "It is a fundamental precept that federal courts are courts of limited jurisdiction." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). The jurisdiction of the federal courts is defined and constrained by Article III of the Constitution and federal statutes. There is no constitutional provision or federal statute for the assumption of jurisdiction over an action merely because the United States has decided to waive its immunity in an entirely separate action. Sanctioning such a rule could open the door for virtually unlimited waivers of the United States sovereign immunity in the federal courts whenever the Government has invoked the original jurisdiction of this Court.[19]

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ancillary jurisdiction. The derivative jurisdiction for removal is statutorily based. 28 U.S.C. § 1441. Here, there is no federal statute permitting the transfer of the United States' sovereign immunity.

The doctrine of ancillary jurisdiction is based upon practical considerations and judicial economy. However, this Court has refused to extend the doctrine to cases where there is no independent jurisdictional basis. Aldinger v. Howard Treasurer of Spokane County, 427 U.S. 1 (1976); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). ("But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action" where there is no basis for federal jurisdiction. *Id.* at 377).

[19] The State Parties themselves refer to the creation of the so-called "Thekla rule" as waiving the United States' immunity

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The piecemeal adjudication of the federal rights – in this case federally reserved water rights – contravenes the policies of "wise judicial administration" (*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); and also the policies set forth in the McCarran Amendment, 43 U.S.C. § 666, governing the adjudication of the United States' federally reserved water rights. As this Court stated in *Colorado River*, "[t]he clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system." 424 U.S. at 819. The Court went on to say:

> This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings.

424 U.S. at 819-820. *See also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). This policy of adjudicating the reserved rights of the federal government in "unified proceedings" would be frustrated by adoption of the State Parties' proposed rule. It would allow elements of the United States' water rights to be adjudicated in other

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"without limitation as to forum." (Pet. Br. at 20). Under this rule there would be no limit to the extent to which private parties could sue the United States.

forums, "permitting inconsistent dispositions of property." 424 U.S. at 819.[20]

Furthermore, adoption of the so-called "Thekla rule" is not necessary in the present case. A finding that the United States retains its sovereign immunity in the district court does not leave the State Parties without a forum to protect their interests. The existing decree in *Arizona v. California* enjoins the Tribes from diverting and using any water within the disputed areas in violation of the decree. Without some sort of adjudication of the boundaries the Tribes cannot obtain water rights for the areas in question. This Court made it clear in *Arizona v. California II*, that when that time comes, the State Parties will be entitled to participate. In view of that fact, there is

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[20] The McCarran Amendment does not provide a waiver of the United States' immunity in the present action. The McCarran Amendment provides that the . . . United States may be joined as a defendant in "any suit . . . for the adjudication of rights to the use of water of a river system or other source." 43 U.S.C. § 666. This Court has squarely held that that does not authorize joinder of the United States in a private suit where all water claimants had not been joined. Dugan v. Rank, 372 U.S. 609 (1963). *See also* Nevada v. United States, 279 F.2d 699 (9th Cir. 1960); Miller v Jennings, 243 F.2d 157 (5th Cir.) *cert. denied* 355 U.S. 827 (1957). The present action does not seek an adjudication of water rights. It challenges title to certain lands. Moreover, even if it could be construed to seek an adjudication, the suit does not involve all claimants to the river system, as required by the McCarran Amendment.

no need for this Court to create a special "Thekla rule" to apply to this case.[21]

Finally, the State Parties' suggestion that the Court "short circuit" the proceedings by appointing a new special master highlights the serious flaws in their attempt to "use this case as the judicial vehicle" to decide the boundary issues. Pet. Br. at 24. (See p. 13 fn. 11, *supra*). As the State Parties admit, scope of review and jurisdictional issues have plagued the parties throughout these proceedings. (Pet Br. at 24). A major problem is that, try as they might, the State Parties cannot separate the "land title questions" associated with their challenge from the "water rights nature" of their challenge. They may contend that they have no interest in the land and that they are only interested in the appurtenant water rights (Pet. Br. at 22), but the fact remains, as their complaint in this case demonstrates, that there is no way to separate the two.

The result is the procedural morass in the district court. If the action is not dismissed, substantial questions will remain concerning "case or controversy", statute of limitations (both under both the Quiet Title Act and the Administrative Procedure Act), the Secretary's authority under 43 U.S.C. § 772, due process protection, and the appropriate scope of review. These difficult issues all

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[21] The State Parties' claim that they need to have the boundaries resolved for planning purposes is nonsense. As the dissenting opinion in *Arizona v. California II* found, under current projections the Metropolitan Water District will not be ready to use its existing entitlements before the year 2010. 460 U.S. 653n.7.

arise becaue the State Parties are "forced" into bringing an action to challenge administration action that is under normal circumstances, unreviewable. *See Lane v. Darlington*, 249 U.S. 331, 333 (1919). In essence, they are trying to fit a square peg in a round hole. It just does not work.

Unfortunately that will not resolve the question of the appropriate forum for resolution of the boundary issues. The State Parties advocate (as they did before the Court in *Arizona v. California II*) the appointment of a special master. The Tribes agree that such a course of action might be the most expeditious way to resolve the boundary issues, in view of the jurisdictional and procedural barriers that exist in the district court.[22]

II. THE APA DOES NOT WAIVE THE SOVEREIGN IMMUNITY OF THE UNITED STATES WHERE, AS HERE, THE STATUS OF TRUST LAND IS CHALLENGED

A. The Relief Sought in this Case Will Divest The Tribes of Their Lands.

Metropolitan seeks to avoid the United States' immunity to suit by invoking the waiver of immunity provision of Administrative Procedure Act, 5 U.S.C. § 702. E.R. 2. Its complaint asks the district court to declare "void" and to issue an injunction setting aside the three orders of the Secretary of the Interior which determined the location of

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[22] It would not be appropriate, however, to appoint district court Judge Brewster as the Special Master.

portions of the boundaries of the three Indian Reservations. The requested relief would divest the Tribes of their beneficial interest in the lands in question and require the United States to hold the disputed areas as public lands rather than as trust lands for the benefit of the Tribe.

The APA does not waive the immunity of the United States in this case because "[n]othing [in the APA] . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The relief sought by Metropolitan is foreclosed by the terms of the Quiet Title Act, which waives the immunity of the United States in suits "to adjudicate a disputed title to real property . . . " but "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a). As noted by the Ninth Circuit, allowing Metropolitan's suit "would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to lands it holds in trust for them," in violation of the protection afforded tribal interests in the QTA. (Pet. App. at 10a.) As a result, the sovereign immunity of the United States bars Metropolitan's lawsuit.

It is important to understand the nature of the relief being sought by the State Parties in this action. Metropolitan's complaint seeks to have the Secretary's boundary orders set aside as "illegal and void"; and to make a "judicial determination and declaration of the boundaries" of the three Reservations. E.R. 13-23. For example, regarding the Fort Mojave Hay and Wood Reserve, Metropolitan seeks to vacate Secretary Morton's order on the

grounds that it is "arbitrary, capricious and unreasonable" E.R. 16. Following the declaration that the order is void, Metropolitan would have the court undertake to determine the "proper" location of the western boundary of the Reserve. According to Metropolitan, "the western boundary of the Camp Mojave Hay and Wood Reserve is the left bank of the Colorado River in its last natural course, excluding the lands of the Colorado River." E.R. 21.[23] If such relief is granted, the Fort Mojave Reservation would be reduced by at least 3,500 acres.[24]

In short, if Metropolitan succeeds, the three Tribes will lose over 30,000 acres of land now included in their Reservations.[25] The severed lands would still be held in fee by the United States as public lands under the control

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[23] As noted *supra* at p. 12 fn. 10, Metropolitan has advocated alternate theories with respect to the "proper" location of the western boundary of the Reserve. In addition to the "last natural course" theory, Metropolitan argues that the full 9114.81 acre Reserve can be located entirely in Arizona. If that theory were accepted, the Fort Mojave Tribe would no longer have any lands in the State of California.

[24] If the order is merely vacated, the Tribe would lose approximately 3,500 acres, since the 1928 resurvey would come into effect. If the last natural course theory is accepted, the Tribe would lose virtually all of the lands within the Reserve. If the Reserve were relocated to the State of Arizona, that would not add the full 9,114.81 acres to the Fort Mojave Reservation, since the relocated reserve would be located on lands already owned by the Tribe.

[25] At Fort Yuma (Quechan), some 25,000 acres of Reservation lands would be severed. At the Colorado River Indian Reservation, some 4,400 acres would be lost. 460 U.S. at 631-33.

of the United States Bureau of Land Management. But that is of little consolation to the Tribes. As a part of their Reservations, the lands are beneficially owned as Indian lands secured by statutes and Executive Orders. *Arizona v. California I*, 373 U.S. at 595-98, and are subject to the special federal laws and regulations that protect and preserve Indian trust lands. *See* F. Cohen, *Handbook of Federal Indian Law* 508-28 (1982 ed.).[26] In contrast, as part of the public domain, the lands would be governed by a completely separate body of federal laws and statutes. *See, e.g.*, the Federal Land Policy Management Act of 1976, 43 U.S.C. § 1701-1728.[27]

Despite the obvious impact on the tribal and federal interests, the State Parties contend that this suit does not fall within the scope of the QTA because they do not claim an interest in any of the lands at issue. Thus, in their view, the APA is an available avenue for relief. The State Parties further argue that even if this suit is governed by the QTA, the Tribes and the United States must

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[26] For example, the lands would be protected against alienation by the Non-Intercourse Act, 25 U.S.C. § 177.

[27] The differences between public lands and trust lands are substantial. When Congress commissioned the study of federal lands by the Public Law Review Commission, Indian lands were excluded. Act of September 19, 1964, Pub. L. No. 88-606, 78 Stat. 982 (formerly codified as amended at 43 U.S.C. §§ 1391-1400 (1971)). Indian lands were studied separately by the American Indian Policy Review Commission. Act of January 2, 1975, Pub. L. No. 93-580, 88 Stat. 1910 (not codified but set out in full at 25 U.S.C. § 174 n.). This Court has also recognized the great differences between the two categories of land. *Cramer v. United States*, 261 U.S. 219, 226-230 (1923).

demonstrate a "substantial possibility" that the disputed lands are trust lands before the district court is divested of jurisdiction. Neither argument is persuasive. Nothing in the language or the history of the QTA suggests the limited applicability urged by the State Parties. And there is no hint anywhere that Congress, in providing a special exception for protecting Indian lands from suit meant for that protection to be effective only after the United States demonstrated the merits of its decision to treat the lands in question as trust lands.

B. The APA Does Not Provide Relief Foreclosed by Other Statutes.

The State Parties' contentions ignore Congress' explicit desire under the APA not to disrupt other statutory provisions such as the QTA, which control the resolution of disputes with the United States in specific areas. As both the language and history of section 702 indicate, Congress did not intend to override the limits of other statutes allowing judicial challenges to the actions of the United States. In *Block v. North Dakota*, 461 U.S. 273 (1983), this Court rejected North Dakota's attempt to circumvent the QTA by the use of section 702, stating:

> We also reject North Dakota's claim that, even if the QTA pre-empted alternative remedies in 1972, Congress created a new supplemental remedy four year later when it amended 5 U.S.C. § 702 with Pub. L. No. 94-574, 90 Stat. 2721. That statute waived federal sovereign immunity for suits against federal officers in which the plaintiff seeks relief other than money damages, but it specifically confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

461 U.S. at 286n.22, quoting the APA.

The legislative history of section 702 fully supports that view. The present version of section 702 was enacted in 1976 as part of Pub. L. No. 94-574. It was an effort by Congress to address various technical defenses used by the United States to preclude judicial review of agency action. In addressing the then-existing barriers to such review, Congress carefully ensured that "[the amendment] would not affect other limitations on judicial review . . . " or "grant relief if any other statute granting consent to suit expressly or impliedly forbids the relief which is sought." S. Rep. No. 996, 94th Cong., 2d Sess. 2 (1976) ("S. Rep. 996"). Thus, the Senate Judiciary Committee viewed the bill as accomplishing only a "partial elimination of sovereign immunity." *Id.* at 9.

The critical clause protecting the framework of existing statutes was added at the prompting of the Department of Justice to ensure conformity with the recommendations of the Administrative Conference. S. Rep. 996 at p. 13. The final phrasing

> makes clear that the committee's intent to preclude other remedies will be followed with respect to *all* statutes which grant consent to suit and prescribe particular remedies. The proviso as amended also emphasizes that the requisite intent can be *implied* as well as expressed.

Id. (emphasis added).[28]

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[28] In limiting section 702, Congress was aware that only four years earlier it had enacted legislation governing actions to adjudicate disputed titles to real property. S. Rep. 996 states:

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C. The QTA is an "Other Statute" that Expressly Forbids the Relief Sought in this Case.

The QTA applies to "civil action[s] under this section to adjudicate a disputed title to real property in which the United States claims an interest . . . " 28 U.S.C. § 2409a(a). "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block v. North Dakota, supra,* 461 U.S. at 286 (footnote omitted). In *United States v. Mottaz, supra,* the Court emphasized that it is the nature of the relief being sought, not its characterization by the plaintiff, that determines the applicability of the QTA. 476 U.S. at 842.

The State Parties argue vigorously that they do fit within the scope of the QTA since they are not seeking to quiet title in themselves in the traditional sense.[29] (Pet.

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> Perhaps the only situation under recent case law, other than suits for damages, where it was fairly predictable–and intended by Congress–that a court would uphold a claim of sovereign immunity, involved disputed title to real property. The results in these cases were so obviously unjust that in 1972 . . . Congress enacted legislation to permit actions to quiet title to be brought against the United States.

S. Rep. 996 at p. 8 (footnote omitted).

[29] The State Parties do not address the longstanding refusal by the courts to interfere with the Department of the Interior's authority to survey and resurvey the public lands. The Secretary's authority to determine or correct boundaries of the public lands is beyond question. *See* 43 U.S.C. §§ 1, 2, 751, 752, 772 (1982). Since the matter rests with the executive

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branch, such surveys have always been considered conclusive in collateral proceedings. Borax Consol. Ltd. v. Los Angeles, 296 U.S. 10, 16-17 (1935), Stoneroad v. Stoneroad, 158 U.S. 240, 250-52 (1895), Knight v. United States Land Ass'n, 142 U.S. 161, 176-78 (1891), Cragin v. Powell, 128 U.S. 691, 698-99 (1888).

In Lane v. Darlington, 249 U.S. 331 (1919), this Court succinctly stated the longstanding rule that only parties whose title is affected may challenge government surveys.

> So long as the United States has not conveyed its land it is entitled to survey and resurvey what it owns and to establish and reestablish boundaries, as well one boundary as another, the only limit being that what it thus does for its own information cannot affect the rights of owners on the other side of the line already existing in theory of law. If, as the result of the survey adopted, the United States should give patents for land thought by the plaintiffs to belong to them, "the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the Court." Litchfield v. The Register, 9 Wall. 575, 578. Minnesota v. Lane, 247 U.S. 243, 250.

Id. at 333. An example of a direct challenge is a pending survey protest by bona fide claimants to Fort Mojave Reservation "checkerboard" lands that were awarded water rights in Arizona v. California II based upon a 1982 resurvey. *See* First American Title Ins. Co. v. Bureau of Land Management, 100 IBLA 270 (1987).

Assuming that QTA does not govern in such circumstances and that the APA therefore waives the United States' immunity to suit, Metropolitan must still show that the interests it seeks to protect are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in

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Br. at 25-30.) But plainly Metropolitan seeks to divest the Tribes of their interests in the disputed lands. The complaint does not seek a boundary determination in order to ascertain the scope of tribal jurisdiction, to decide the applicability of various federal environmental laws, or for any purpose other than to determine whether the disputed land is held in trust for the benefit of the affected Tribes. It makes little difference if, in the end, title is not quieted in Metropolitan's name. The fact remains, as the Ninth Circuit aptly stated, that "the effect of a successful challenge would be to quiet title in others than the Tribe." Pet. App. at 9a.[30]

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question." Association of Data Processing Service Org. v. Camp, 397 U.S. 150, 152-53 (1970). Nothing in federal survey statutes suggests that they were intended to protect parties such as Metropolitan. For example, 43 U.S.C. § 772 protects the interests of "any claimant, entryman, or owner of lands affected by such resurvey or retracement." Metropolitan does not fit any of those categories, since it claims no land within the resurveyed areas. *See also* Fadem v. United States, 791 F.2d 1381, 1383 (9th Cir. 1986) (There is no private cause of action – either express or implied – under the federal survey statutes.)

[30] The State Parties' admitted concern over the Secretary's orders is the possible impact of those orders on the allocation of water to the Tribes under the Court's decree in *Arizona v. California*. Any increase in the tribal rights will be dependent on two factors. First, the Court must conclude that the boundary disputes have been finally determined, *i.e.*, subjected to judicial review. To affect the tribal water rights, the lands must be held as trust lands, not merely included within the exterior boundaries of the Reservation. *See* Arizona v. California, Decree, 376 U.S. 340, 342, 345 (1964).

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Nothing on the face of the QTA suggests that it was intended to apply only when the plaintiff claimed title to the disputed land. The State Parties cite to the requirement under subsection (c) that the plaintiff set forth the nature of *its* "right, title, or interest" in the property. Pet. Br. at 25. That provision hardly supports the State Parties' position. Indeed, if anything, it demonstrates that the Act applies to a broad range of claims other than claims to title, where a plaintiff asserts a "right" or "interest" other than actual title to the lands.[31] Similarly, by disclaiming

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The areas recognized as trust lands also must be found to be "practically irrigable." *Arizona v. California II*, 460 U.S. at 640, 641. Special Master Tuttle previously addressed the issue of the irrigability of the disputed lands but the Court found it unnecessary to address his recommendations in light of its decision not to accept the Secretary's orders as finally determining the reservation boundaries in the absence of any opportunity for the petitioners to challenge the Secretary's conclusion. *Id.* at 641.

[31] On page 26 of their Brief, the State Parties cite four cases decided before *Block v. North Dakota, supra,* and *United States v. Mottaz, supra,* in support of their contention that the QTA does not apply to actions in which the plaintiff claims no interests in the disputed property. With the exception of the City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465 (D.D.C. 1978), those cases address the question of who may invoke the waiver of immunity in the QTA rather than the interaction between section 702 of the APA and the QTA. Florida Dept. of Business Regulations v. United States Dep't of the Interior, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) provides a more thoughtful analysis of that issue that reflects the holding in *Block* and is consistent with the holding below in this case:

(Continued on following page)

the application of the waiver to litigation over the security interests or water rights of the United States, the language indicates that the QTA was intended to govern *all* other disputes over the real property interests of the federal government.

This Court's decision in *United States v. Mottaz, supra,* provides a complete response to the State Parties' arguments that the Act applies only when the United States is in danger of losing its title to the land. There, the respondent, a Chippewa Indian, claimed an interest in certain lands which were formerly held as allotments. "Title to each of these allotments [had been] held in trust by the United States." 476 U.S. at 836. Mottaz's interests in the allotments had been sold to the Forest Service for inclusion in the Chippewa National Forest. In her lawsuit, Mottaz sought return of the land. Thus, as here, legal title

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> By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold land in trust for Indian tribes. Here the appellants seek an order divesting the United States of its title to land held for the benefit of an Indian tribe. That appellants do not assert an adverse claim of title to the land, however, does not lessen the interference with the trust relationship a divestiture would cause. Moreover, Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust. It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands. Hence we conclude that the APA waiver of immunity is inapplicable in this instance.

768 F.2d at 1254-55 (footnotes omitted).

was not at issue. The relief sought by Mottaz would simply have returned the land to trust status and not have divested the United States of the underlying fee. The Court nevertheless denied relief, determining that the QTA applied and that its twelve-year statute of limitations precluded suit.

D. The Indian Lands Exception Applies.

The history of the Indian lands exception demonstrates Congress' intent to protect Indian lands from challenges such as those brought by Metropolitan. In addition to the operative sentence of the Quiet Title Act, the legislation provided "several 'appropriate safeguards for the protection of the public interest'" recommended by the executive branch. *Block v. North Dakota, supra,* 461 U.S. at 283, quoting from the testimony of Department of Justice officials at the Senate Hearing. For purposes of this case, the most important aspect of the executive proposal was the provision which "excluded Indian lands from the scope of the waiver." *Id.*

The bill as passed by Congress closely resembled the executive branch proposal. The final legislation implemented the Department of Justice's desire to make sure that "trust and restricted Indian lands are specifically protected from *challenge* . . . " Letter to the Vice President from the Attorney General, dated October, 1971, included in S. Rep. 575 at p. 5 (emphasis added). The importance of the changes suggested by the Justice Department has been noted by the Solicitor of the Department of the Interior.

> The Justice proposal specifically excludes land held in trust for Indians and Indian restricted lands. The federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States government. The Federal Government has over the years made specific commitments to the Indian people through written treaties through treaties and through informal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

H. Rep. No. 1559, 92d Cong., 2d Sess. p. 13 (1972); S. Rep. No. 575, 92d Cong., 1st Sess. 4 (1971). Waiver of immunity in suits affecting Indian title was viewed as inconsistent with longstanding federal commitments to Tribes. *Block v. North Dakota, supra,* 461 U.S. at 283.

Thus, despite its intent in the QTA to permit the adjudication of disputes over federal property interests, Congress carefully crafted an explicit exception to protect individual Indians and tribes from litigation over claims to their property. Whatever the merits of allowing suits with the potential to divest the federal government of its property, Congress felt that the importance of keeping Indian lands free from judicial challenge outweighed the need to extend its newly-created rule to Indian lands.

The State Parties' arguments are in direct conflict with the protections for Indian lands desired by the executive branch and enacted by Congress. This Court's decision in *Mottaz* explains the proper application of the Indian lands exception. In response to Mottaz's argument that the QTA did not apply to her claims, the Court stated that "when the United States *claims* an interest in real

property based on that property's *status as trust or restricted Indian Lands,* the Quiet Title Act does not waive the Government's immunity." 476 U.S. at 843 (emphasis added). Here, since the lands in dispute are held as trust lands,[32] the United States' immunity has not been waived.

E. The United States Is Not Required to Demonstrate a Substantial Possibility that the Lands Are Trust or Restricted Lands.

The State Parties also contend that even if the QTA applies to this case, the United States and Tribes must demonstrate a "substantial possibility" that the disputed lands are in fact Indian lands before invoking the sovereign immunity of the United States to foreclose suit. (Pet. Br. 36-43).

Neither the language nor the history of the QTA intimates such a test. While allowing the United States to be named as a party defendant in title disputes, nothing in the exception regarding Indian lands or its history suggests that the United States' immunity was waived in order to test the validity of the federal assertion that the lands under scrutiny were held for the benefit of Indians. To the contrary, under the bill, as described by the Attorney General, Indians are specifically protected from "challenge." H. Rep. 1559, *supra,* at 10.

The State Parties' contention runs directly contrary to Congress' intent. The express protection which Congress

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[32] There is no dispute that the lands in question are currently held in trust for the Tribes and Metropolitan's complaint acknowledges this fact. E.R. 4.

extended to Indian lands would be obviated if the United States were put to the task of proving its claim of trust status before invoking its sovereign immunity to bar suits adjudicating the status of such lands. Congress, as urged by the executive branch, plainly felt that the need to provide a forum for the adjudication of title disputes with the United States did not warrant the disruption of the federal relationship with Indian tribes which would occur if suits to challenge federal claims to land on behalf of Indians were allowed.

The State Parties rely on *Spaeth v. United States Secretary of the Interior*, 757 F.2d 937 (8th Cir. 1985), to support their argument that the United States must demonstrate the validity of its claims before invoking its immunity. Their reliance on *Spaeth* overlooks the fact that the lands in dispute in that case were not held in trust by the United States or otherwise treated as Indian lands, but rather were subject only to outstanding claims by the United States that the Spaeths' title was invalid and the lands should be considered to be Indian lands.[33]

The *Spaeth* court expressly acknowledged that its "analysis of the jurisdictional issues [was] affected by the

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[33] The Department of the Interior had written the Spaeths indicating the possibility of outstanding claims to the lands which the Spaeths had possessed for thirty years and were attempting to sell. The Department had also issued a Solicitor's opinion which clouded the title to lands, such as the Spaeths, which originally had been allotted to members of the White Earth Band of Chippewas, and had arguably gone out of trust status through improper methods. As a result of the actions of the Department of the Interior, the sale price of the Spaeths' land was reduced by fifty percent.

extremely unusual facts of [the] case." 757 F.2d at 945. The court of appeals resolved the question of whether to apply the Indian lands exception to lands possessed by non-Indians by concluding that the exception would apply only if the United States demonstrated a substantial possibility that the lands in question were, indeed, trust or restricted lands.

No such unusual facts exist here. There is no dispute over the status of the lands which are the subject of Secretarial orders, and held in trust for the benefit of the affected Tribes. The *Spaeth* court's willingness to look behind the status of the disputed lands is also inconsistent with this Court's treatment of the same issue in *United States v. Mottaz, supra*, where the existing status of the lands as National Forest lands – whatever the merits of Mottaz's claim – was determined to preclude the application of the Indian lands exception. 476 U.S. at 842-43.[34]

Finally, the State Parties' claims of great "potential for mischief" in the absence of a test such as that

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[34] Moreover, there will be no impact on the State Parties in the absence of a tribal or federal motion in *Arizona v. California* to increase the allocations to the Tribes. And, certainly, this Court has made it very clear that such a motion cannot succeed in the absence of an opportunity for Metropolitan to challenge the Secretary's disputed orders. As a result, the unresolved status of the boundaries imposes no burden on Metropolitan, which, as Special Master Tuttle noted, has not even bothered to address the possibility of increased awards of water to the Tribes. *Tuttle Report* at 43.

suggested in *Spaeth* are not persuasive.[35] Certainly, those claims provide no justification for overriding the clear intent of Congress. In any event, parties affected by federal decisions to hold land in trust will almost always have a forum in which to challenge the disputed decisions, whenever those decisions injure their interests. In such circumstances, implementation of the federal decision will require the United States to initiate litigation in which sovereign immunity will not foreclose adjudication of the merits of the federal viewpoint.[36] Only when the

[35] The State Parties repeatedly remind the Court that the boundary disputes at Ft. Mojave and Colorado River were resolved against the Tribes and the United States by Special Master Rifkind. In so noting, the State Parties neglect to mention that, in reaching his conclusions, the Special Master relied heavily on the fact that the official pronouncements of the Interior Department were in conflict with its litigating position before the Special Master. The disputed orders eliminate these inconsistencies in order to permit scrutiny of the Government's position so that ultimately the Tribes may obtain water for such lands in *Arizona v. California*.

[36] As the 1983 decision in *Arizona v. California* clearly states, the United States cannot invoke its sovereign immunity to foreclose a challenge to the Secretary's orders when it seeks recognition of water rights for the disputed lands.

More generally, the United States must initiate an action in ejectment if claimants are in possession of the disputed property or to set aside a patent if one has issued. United States v. Reimann, 504 F.2d 135 (10th Cir. 1974); United States v. Hudspeth, 384 F.2d 683 (9th Cir. 1967). Federal immunity will not bar the review of the federal claims in such instances.

In the pending *First American Title Ins. Co.* survey protest, cited *supra* at p. 35 n. 29, the United States or the Fort Mojave Tribe will eventually have to sue the claimants to quiet title since the parties are in possession of the lands.

United States is deciding how to manage its own lands, and no other party is injured, or when a tribe is already in actual and complete possession of the disputed lands, will review be precluded. But the protection thereby afforded to Indian lands is exactly the outcome Congress desired and provided in the QTA.

CONCLUSION

The Ninth Circuit's decision ordering dismissal of this case should be affirmed.

Dated this 12th day of August, 1988.

Respectfully submitted,

DALE T. WHITE
WHITEING, THOMPSON & WHITE
6684 Gunpark Drive
Boulder, CO 80301
(303) 530-1335

Attorney for the Fort Mojave Indian Tribe

WILLIAM E. STRICKLAND
STRICKLAND & ALTAFFER
700 Transamerica Bldg.
Tucson, AZ 85701
(602) 622-3661

Attorney for the Quechan Indian Tribe

SCOTT B. MCELROY
Counsel of Record
GREENE, MEYER & MCELROY
1007 Pearl Street, Suite 240
Boulder, CO 80302
(303) 442-2021

Attorney for the Colorado River Indian Tribes

(7)

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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
EDWARD J. SHAWAKER
SARAH P. ROBINSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court has jurisdiction over this suit challenging the United States' claim that it holds title to certain land in trust for the benefit of an Indian Tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 830 F.2d 139. The opinion of the district court (Pet. App. 12a-26a) is reported at 628 F. Supp. 1018.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1987. The petition for a writ of certiorari was filed on January 11, 1988, and was granted on April 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*; the Quiet Title Act, 28 U.S.C. (& Supp. IV) 2409a; and the McCarran Amendment, 43 U.S.C. 666, are reproduced as an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. This case involves a challenge by two public water agencies in California and the States of California and Arizona to orders of the Secretary of the Interior that redetermined the boundaries of the Fort Mojave, Colorado River, and Yuma (Quechan) Indian Reservations. This Court recognized reserved water rights for the three Reservations in *Arizona* v. *California,* 373 U.S. 546, 598-600 (1963) (*Arizona* v. *California I*), in which the Court, in the exercise of its original jurisdiction, allocated the mainstream waters of the lower Colorado River among the States of California, Arizona, and Nevada and adjudicated the rights of the United States to water for a number of federal reservations in the lower Colorado River basin. Questions concerning the boundaries of the three Indian Reservations at issue here have been raised but not resolved in *Arizona* v. *California.* See *Arizona* v. *California,* 460 U.S. 605, 628-641 (1983) (*Arizona* v. *California II*).

In this suit challenging the Secretary's administrative determinations of the boundaries, the parties agreed to litigate first the challenge to the 1974 order of the Secretary pertaining to the Fort Mojave Reservation and a 1978 resurvey of the Reservation's boundary based on the 1974 order. Because the Fort Mojave Reservation therefore was the subject of the district court's decision and the interlocutory appeal, we shall briefly describe the nature of the boundary dispute concerning that Reservation.[1]

The Fort Mojave Reservation originally was established by Executive Order of the President dated March 30, 1870, as a military reservation, which consisted of two parts: the Camp Mojave Military Reservation and the Camp Mojave Hay and Wood Reserve. E.R. 65-66, 72.[2] By Executive Order dated September 19, 1890, both portions of the Reservation were

[1] The boundary disputes concerning the other Reservations are described in *Arizona* v. *California II,* 460 U.S. at 631-633.

[2] "E.R." refers to the excerpts of the district court record that were filed in the court of appeals.

transferred to the Secretary of the Interior for the benefit of the Fort Mojave Indians. E.R. 74. An additional portion was added to the Reservation in 1911. A.R. 45-46;[3] *Arizona* v. *California I,* 373 U.S. at 596 n.100.

At issue here is a dispute concerning the location of the western boundary of the Hay and Wood Reserve portion of the Fort Mojave Reservation. The 1870 order that first set aside the Hay and Wood Reserve for military purposes described the boundaries of the Reserve in an internally inconsistent manner. It described the land by courses and distances and with reference to the total amount of acreage (9114 acres) within the Reserve. However, it also referred to two posts marking the western boundary as being "near the left bank of the Colorado River." E.R. 65-66.[4] As explained in the legal opinion on which the Secretary based his 1974 order that petitioners challenge in this case, if the boundaries of the Hay and Wood Reserve are to correspond to the courses and distances and if the Reserve is to comprise the full 9114 acres, the western boundary could not be located at the Colorado River, but instead must be somewhat to the west of the River. Indeed, if the boundary were placed at the location of the River in 1870, the area of the Reserve would be reduced by approximately 3500 acres, or 38%. A.R. 10-11. Nevertheless, in 1928, the Reserve was officially surveyed pursuant to instructions that placed its western boundary at the left bank of the River, and that survey was adopted by the General Land Office in 1931. *Arizona* v. *California II,* 460 U.S. at 631-632; A.R. 8.

2. In *Arizona* v. *California I,* the Court held that the Boulder Canyon Project Act, 43 U.S.C. 617-617t, mandates a scheme for apportioning the mainstream waters of the Colorado River among the States in the Lower Basin and empowers the

[3] "A.R." refers to the administrative record that was compiled in connection with the Secretary's issuance of the 1974 order and is part of the record in the district court.

[4] The legal description actually is contained in a War Department memorandum dated March 12, 1870 (E.R. 65-71), which described a number of military reservations and was approved in the March 30, 1870, Executive Order of the President.

Secretary of the Interior to effectuate that apportionment by making contracts for the delivery of water (373 U.S. at 564-565, 575-582).[5] The two California public water agencies that are petitioners in this case, the Metropolitan Water District (MWD) and the Coachella Valley Water District (Coachella), receive Colorado River water pursuant to contracts with the Secretary made under that authority.

The Court in *Arizona* v. *California I* also adjudicated the reserved rights of the United States to the use of waters of the mainstream of the lower Colorado River for five Indian Reservations and other federal establishments (373 U.S. at 595-601). The reserved water rights for the five Indian Reservations have priority dates of the establishment of the respective Reservations and are calculated on the basis of the quantity of water required to irrigate the "practicably irrigable acreage" within each Reservation (*id.* at 600-601). Under the statutory scheme established by the Boulder Canyon Project Act, the Secretary must satisfy certain prior rights, called "present perfected rights," before furnishing water under contracts entered into pursuant to that Act, such as those with petitioners MWD and Coachella (*id.* at 584; see also *Bryant* v. *Yellen,* 447 U.S. 352, 364-365 (1980)). The reserved rights recognized by the Court in *Arizona* v. *California I* for the Indian Reservations and other federal establishments are "present perfected rights" for these purposes, and they therefore must be satisfied before the Secretary may deliver water under contracts.[6]

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[5] Arizona initiated the proceedings in *Arizona* v. *California* in 1952 by filing a complaint naming the State of California and seven of its public water agencies as defendants. Arizona sought to establish its rights in the Colorado River system and to limit California's annual consumptive use of water from the River. Nevada intervened, seeking a determination of its rights, and Utah and New Mexico were joined as defendants. The United States intervened to assert the water rights of various federal establishments, including the three Indian Reservations that are the subject of the Secretarial orders at issue in this case. See *Arizona* v. *California II,* 460 U.S. at 608-609.

[6] The decree implementing the Court's decision in *Arizona* v. *California I* defines "perfected rights" as (i) rights acquired in accordance with state law and exercised by the actual diversion of a specific quantity of water for

In 1964, the Court entered a decree specifying the shares of mainstream water to which Arizona, California, and Nevada are entitled, as well as the quantity of water to which the United States is entitled for each of the Indian Reservations and other federal establishments (376 U.S. 340 (1964), as amended, 383 U.S. 268 (1966)). The decree mandates, inter alia, that all uses of water within a State, including uses by the United States for Indian Reservations and other federal establishments, must be charged to that State's apportionment. 376 U.S. at 343; see also *Arizona* v. *California I,* 373 U.S. at 601.[7] As a result, for example, reserved water rights for federal establishments in California, including the portion of the Fort Mojave Reservation that is situated in California, have a priority over the contractual rights of petitioners MWD and Coachella that also must be satisfied out of California's allotted share of mainstream water.

3. The controversy concerning the western boundary of the Hay and Wood portion of the Fort Mojave Reservation has surfaced twice in *Arizona* v. *California.* The first occasion was during the proceedings before Special Master Rifkind that preceded the decision in *Arizona* v. *California I.* After receiving evidence on the issue, Special Master Rifkind concluded in his report that the United States was bound by the 1928 survey that drew the boundary of the Hay and Wood Reserve at the Colorado River, thereby excluding the 3500 acres at issue here, and that, in any event, the 1928 survey was the best evidence of the proper location of the boundary.[8] He then relied on that boundary determination in calculating the number of practicably irrigable acres

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definite purposes, and (ii) "water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use" (376 U.S. 340, 341 (1964)). The decree defines "present perfected rights" as "perfected rights * * * existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act" (*id.* at 341).

[7] In 1979, the Court entered a supplemental decree quantifying all the present perfected rights to be satisfied out of the Lower Basin waters of the River (439 U.S. 419).

[8] Report of the Special Master, Dec. 5, 1960, at 283-287, *Arizona* v. *California,* No. 8 (1960 Term); see also *Arizona* v. *California II,* 460 U.S. at 632.

within the Fort Mojave Reservation and the corresponding number of acre-feet of water necessary to satisfy the present perfected right for the Reservation. The Court, however, declined to adopt Special Master Rifkind's recommendation regarding the boundary issue, explaining (373 U.S. at 601):

> We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time.

Nevertheless, in its 1964 decree, the Court used Special Master Rifkind's calculations, which excluded all practicably irrigable acres within the 3500-acre area, in calculating the amount of water reserved for the Reservation (376 U.S. at 345; see *Arizona* v. *California II,* 460 U.S. at 630). However, the Court included a proviso in the decree that contemplated a future resolution of the boundary dispute (*ibid.*):

> [T]he quantities [of water] fixed * * * shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

See also 439 U.S. 419, 421, 426 (1979) (supplemental decree).

4. In 1974, the Secretary of the Interior issued an administrative order concluding that the 1928 survey upon which Special Master Rifkind had relied in his recommendation to the Court in *Arizona* v. *California I* was erroneous and that the Executive Order establishing the Hay and Wood Reserve actually was intended to place the western boundary of the Reserve to the west of the Colorado River.[9] The Secretary therefore con-

[9] The Secretary's order took the form of a memorandum from the Secretary to the Director of the Bureau of Land Management (BLM), which incorporated a legal opinion of the Associate Solicitor for Indian Affairs that explained the internal inconsistency in the original description of the Reserve and the basis for concluding that the 3500 acres in question were intended to be within the Reservation as originally established. E.R. 75-78; A.R. 9-40. On the basis of his thorough examination of events leading to the creation of the Reserve in 1870 and thereafter, the Associate Solicitor concluded, inter alia, that the identification of the western boundary of the Reserve at the Colorado River probably resulted from the erroneous location of the River on maps that were then available to the responsible office of the Army in San Francisco in 1870 (A.R. 12-13), and that Lt. Wheeler, whose survey notes formed the basis for the Reserve, did survey the entire 9114-acre area (*id.* at 18-24).

concluded that the 3500 additional acres enclosed by the relocated boundary are part of the Fort Mojave Reservation. Accordingly, the Secretary declared null and void the 1928 survey and ordered that the boundary be resurveyed in accordance with his determination. E.R. 75-76. The plat of the resurvey was filed on November 6, 1978. Pet. App. 3a & n.2, 13a-14a, 16a; *Arizona* v. *California II,* 460 U.S. at 631-632. The United States had retained legal title to most of the 3500 acres from 1928 to 1974, and they were then being administered as non-Indian public lands, under BLM jurisdiction. However, since the 1974 Secretarial order and the 1978 resurvey, those lands have been administered by the Bureau of Indian Affairs as lands held by the United States for the benefit of the Fort Mojave Tribe.

5. a. After the official plat of the resurvey of the Hay and Wood Reserve was filed in November 1978, the United States filed a motion in this Court in December 1978 requesting the Court to amend the decree in *Arizona* v. *California* to increase the quantity of water to which the United States is entitled for the Fort Mojave Reservation. The United States argued that the Secretary's 1974 order and 1978 resurvey had "finally determined" the boundary of the Reservation within the meaning of the proviso to the 1964 decree of this Court, quoted at page 6, *supra,* and that the United States, on behalf of the Tribe, is entitled to the additional water necessary to irrigate the "practicably irrigable acreage" within the 3500-acre area. The Court referred the United States' motion to amend the decree to the new Special Master, Elbert P. Tuttle. 439 U.S. 419, 436-437 (1979). In a preliminary report issued on August 28, 1979, Special Master Tuttle agreed with the United States that the Secretary's 1974 order had "finally determined" the boundary of the Fort Mojave Reservation and that the decree should be

amended to increase the quantity of water to which the United States is entitled under the present perfected right for the Reservation (*Arizona* v. *California II,* 460 U.S. at 612-613). The Court denied the States' motion for leave to file exceptions to this preliminary report. 444 U.S. 1009 (1980).

On July 21, 1981, before Special Master Tuttle issued his final report, petitioners MWD and Coachella filed the instant suit against the United States and the Secretary of the Interior in the United States District Court for the Southern District of California. E.R. 166.[10] Invoking the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, as the basis for judicial review, petitioners requested the court to set aside the Secretary's 1974 order and to make a "judicial determination and declaration as to the boundaries of the Fort Mojave Indian Reservation"—specifically, to declare that the western boundary is located along the "left bank of the Colorado River in its last natural course" (Second Amended Complaint at 17, 22; E.R. 17, 22), thereby excluding the disputed 3500 acres from the Reservation lands that the United States holds in trust for the Tribe.

On February 22, 1982, Special Master Tuttle filed his final report, concluding that the Secretary's order had "finally determined" the boundary for the purpose of amending the decree implementing *Arizona* v. *California I. Arizona* v. *California II,* 460 U.S. at 613. On April 29, 1982, the district court stayed proceedings in the instant suit pending this Court's ruling on the exceptions to the Master's report. Pet. App. 5a.

b. In *Arizona* v. *California II,* the Court rejected Special Master Tuttle's recommendation that the Court amend the decree to increase the quantity of water allocated to the Fort Mojave Reservation on the basis of the Secretary's 1974 order and the 1978 resurvey. The Court stated that when it rendered the decision in *Arizona* v. *California I* and entered the implementing decree, it

[10] The States of California and Arizona were subsequently joined as nominal defendants in the instant suit, after they declined to intervene (E.R. 11-12), although they aligned themselves with the plaintiffs (see Pet. Br. 2) and are petitioners herein. The Fort Mojave Tribe, the Colorado River Tribe, and the Fort Yuma (Quechan) Tribe intervened as defendants. Pet. App. 3a.

> in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies, or private water users holding priority rights.

460 U.S. at 636. The Court then expressed its preference that the boundary dispute be settled outside of the original proceedings in *Arizona* v. *California.* The Court referred specifically to the instant case, which was then pending (but had been stayed) in the district court (*id.* at 638 & n.27). At the same time, the Court recognized that there might be jurisdictional or other obstacles that would render it impossible for the district court to resolve the boundary issue in this case (*id.* at 638 (footnotes omitted)):

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court. If the litigation goes forward and is concluded, there will then also be time enough to determine the impact of the judgment on our outstanding decree with respect to Indian reservation water rights.

See also 460 U.S. at 657-658 n.10 (Brennan, J., dissenting).

c. The proceedings in the instant case recommenced after the Court rendered its decision in *Arizona* v. *California II.* As petitioners note (Pet. Br. 11-12), on June 17, 1983, the United States withdrew most of the objections that it had raised in the

motion to dismiss to which this Court referred in *Arizona* v. *California II*.

Thereafter, in a decision rendered on February 25, 1986, the district court set aside the Secretary's 1974 order under the APA (Pet. App. 12a-26a). The court first held that the 1974 order and 1978 resurvey exceeded the Secretary's statutory authority within the meaning of the APA, 5 U.S.C. 706(2)(C). The court relied on 43 U.S.C. 772, which permits the Secretary to resurvey public lands but provides that "no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement." The court rejected the contention by the United States and the Tribes that the quoted proviso protects only those persons who claim an interest in the land itself, and concluded instead that petitioner MWD must be regarded as a "claimant" because its contractual water rights would be affected if the United States is entitled to a reserved water right to irrigate land in the area included in the Reservation by the resurvey. Pet. App. 19a-20a. The court also held that the Secretary's 1974 order was issued without observance of procedures required by law, within the meaning of the APA, 5 U.S.C. 706(2)(D), because it adversely affected the water agencies' property rights under their water contracts with the Secretary of the Interior without affording them an opportunity to be heard (Pet. App. 20a-24a). Having set aside the Secretary's order, the court announced its intention to make a de novo determination of the proper location of the disputed boundary, rather than remanding the matter to the Secretary, and it therefore set the case for further proceedings (*ibid.*).

6. The district court certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals granted leave to appeal (E.R. 162-164). In considering the issues to be raised on appeal, we re-examined the question of the district court's jurisdiction in light of two court of appeals decisions that had been rendered since the United States withdrew its jurisdictional objections in the district court. See *Fadem* v. *United States*, 791 F.2d 1381 (9th Cir. 1986) (holding that a

challenge to a boundary survey under 43 U.S.C. 772 may be brought only under the Quiet Title Act, 28 U.S.C. 2409a); and *Florida Dep't of Business Regulation* v. *United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985) (holding that the "Indian lands" exception to the Quiet Title Act, 28 U.S.C. 2409a(a), bars a suit under the APA challenging the Secretary's right to hold land in trust for Indians), cert. denied, 475 U.S. 1011 (1986). Based on those decisions and their elaboration upon the teachings of *Block* v. *North Dakota*, 461 U.S. 273 (1983), and *United States* v. *Mottaz*, 476 U.S. 834 (1986), regarding the "Indian lands" exception in the Quiet Title Act (QTA) and the exclusiveness of the remedy afforded by the QTA, the United States renewed on appeal its argument that the APA does not confer authority on the district court to entertain the petitioner water agencies' challenge to the Secretary's boundary determination.

The court of appeals held that the district court is without jurisdiction, and it remanded the case with directions to dismiss the complaint without reaching the merits of the boundary dispute (Pet. App. 1a-11a). The court of appeals first rejected petitioners' contention that the United States had waived its sovereign immunity to the instant suit in the district court by intervening in the original proceedings in this Court in *Arizona* v. *California* for purposes of establishing the water rights of federal establishments (Pet. App. 7a-8a). The court observed that although the boundary issue might affect those water rights, "[a]n application to the Supreme Court under a continuing decree for a reallocation of water rights cannot be viewed, under any stretch of the imagination, as consent by the Secretary to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation boundaries" (*id.* at 8a (footnote omitted)).

The court of appeals next held that the APA does not furnish a basis for the district court to review the Secretary's boundary determination and declare the proper location of the boundary, because the APA "does not waive immunity as to any claims which are expressly or impliedly forbidden by 'any other statute

that grants consent to suit' " (Pet. App. 9a, quoting 5 U.S.C. 702(2)). The court ruled that the QTA is such a statute, because it grants consent to certain suits challenging the United States' title to real property but expressly withholds consent to suits challenging the United States' title to "trust or restricted Indian lands" (28 U.S.C. (Supp. IV) 2409a(a)). Pet. App. 9a. The court rejected petitioners' contention that the QTA does not foreclose this suit because petitioners do not assert an interest in the 3500 acres that were included in the Reservation by the resurvey of the boundary; the court reasoned that the "Indian lands" exception in the QTA remains relevant in this setting because "the effect of a successful challenge would be to quiet title in others than the Tribe" (*ibid.*) and because "[t]o allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them" (*id.* at 10a). The court of appeals also rejected petitioners' contention, based on *Spaeth* v. *Secretary of Interior,* 757 F.2d 937 (8th Cir. 1985), that even if this suit is governed by the QTA, the United States should not be permitted to invoke the exception in that Act for "trust or restricted Indian lands" unless it makes a threshold showing that there is a substantial likelihood that the land has that status. The Court explained that " '[t]he immunity of the government applies whether the government is right or wrong' " (Pet. App. 11a, quoting *Wildman* v. *United States,* 827 F.2d 1306, 1309 (9th Cir. 1987)).

Finally, the court of appeals held that the necessary consent to this suit is not supplied by the McCarran Amendment, 43 U.S.C. 666, in which Congress granted consent to join the United States as a defendant in a suit to adjudicate rights to the use of the waters of a river system or other source. Relying on this Court's decision in *Dugan* v. *Rank,* 372 U.S. 609, 617-618 (1963), the court explained that the McCarran Amendment authorizes "only suits to adjudicate the rights of all claimants on a stream," and it concluded that "[t]his suit is not such a general adjudication" (Pet. App. 11a).

SUMMARY OF ARGUMENT

I. The United States is immune from suit in the absence of an express waiver of that immunity by Congress. In this case, petitioners principally rely on the waiver of sovereign immunity in the 1976 amendments to the Administrative Procedure Act, 5 U.S.C. 702. However, that provision by its terms does not "confer[ ] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" (5 U.S.C. 702(2)). The Quiet Title Act (QTA), 28 U.S.C. (& Supp. IV) 2409a, is such a statute. The QTA grants consent to name the United States as a party in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. (Supp. IV) 2409a(a). However, the QTA contains express exceptions that withhold the waiver of sovereign immunity for suits involving "water rights" or "Indian lands." *Ibid.* Each of those exceptions is applicable here. Since the QTA therefore "expressly forbids the relief that is sought" (5 U.S.C. 702(2)), the APA's waiver of sovereign immunity does not authorize the district court to grant petitioners relief.

The "water rights" exception in the QTA applies here because petitioners claim no interest in the land itself and their sole purpose in bringing this suit is to defeat the United States' claim to reserved water rights. In fact, petitioners acknowledge that this "is clearly an action 'involving or relating to water rights' " (Br. 44). Petitioners cannot avoid the preclusive effect of the "water rights" exception by splitting their cause of action and seeking adjudication of only one of its elements: the reserved status of the land for which the United States claims water rights. The preclusive effect of the "water rights" exception in the QTA is reinforced by the McCarran Amendment, 43 U.S.C. 666, which does grant consent to name the United States as a defendant in a suit to adjudicate water rights, but only in the context of a general adjudication of all of the rights in a river system or other source. See *Dugan* v. *Rank,* 372 U.S. 609, 618 (1963). This suit, by contrast, concerns only one aspect of the water rights of only one party (the United States). Accordingly, for purposes of

the APA's waiver of sovereign immunity in 5 U.S.C. 702, the McCarran Amendment, like the QTA, is another statute that grants consent to suit but forbids the partial water rights adjudication that petitioners seek. Congress expressly preserved the special and limited statutory regime for the adjudication of water rights under the McCarran Amendment when it enacted the QTA in 1972, and the legislative history of the APA's waiver of sovereign immunity in 5 U.S.C. 702 makes clear that it likewise was not intended to disturb that regime.

This suit is also barred by the "Indian lands" exception in the QTA. That exception withholds consent to suits "by third parties challenging the United States' title to land held in trust for Indians," and it therefore applies whenever "the United States claims an interest in real property based on that property's status as trust or restricted Indian land" (*United States* v. *Mottaz,* 476 U.S. 834, 842, 846 (1986)). Petitioners do not dispute that the 3500 acres in question are "held in trust for Indians" and that the United States claims an interest in the land on that basis. Moreover, this suit conflicts with the underlying purposes of the Indian lands exception of preventing third parties from disrupting the solemn obligations of the United States to the Indian and subjecting the Indians' land to suit without their consent. The Court in *Block* v. *North Dakota* 461 U.S. 273, 285 (1983), stressed that plaintiffs must not be permitted to circumvent the Indian lands exception and other limitations in the QTA by resorting to other avenues of relief, including the APA. Petitioners contend, based on *Spaeth* v. *Secretary of Interior,* 757 F.2d 937 (8th Cir. 1985), that the United States was required to satisfy the courts below that there is a "substantial possibility" that the 3500 acres are in fact Indian trust lands before it could invoke the Indian lands exception. However, it would be inappropriate to require a court to delve deeply into the merits in order to determine the sovereign's amenability to suit. *Spaeth* did not identify any basis in the QTA for this novel precondition to the invocation of sovereign immunity, and the QTA and the decision in *Mottaz* make clear that the application of the Indian lands exception turns on the interest the United States claims. Nor does this case present the special equitable circumstances that underlay the *Spaeth* ruling. At most, the United States could be required to show that its assertion that the disputed property is Indian land is "substantial" in the sense of being non-frivolous, a standard that is unquestionably satisfied in this case.

Petitioners err in contending that the limitations in the QTA are irrelevant because they do not seek to divest the United States of property or to quiet title in themselves. Petitioners plainly *do* seek to divest the United States of its legal title to (and the Tribe of its equitable interest in) all reserved water rights for the 3500-acre tract. And even with respect to the land itself, the effect of a judgment in petitioners' favor would be to quiet title to the land itself in someone other than the Tribe, and thereby allow third parties to disrupt the United States' relationship with the Indians to the same extent as if petitioners did claim an interest in the land. Moreover, 28 U.S.C. (Supp. IV) 2409a(d) makes clear, and petitioners concede, that relief may be awarded under the QTA only to a person who claims an interest in the disputed property. Because the QTA therefore "impliedly forbids" the granting of relief to parties who do not claim an interest in the property, the waiver of sovereign immunity in 5 U.S.C. 702(2) is inapplicable.

II. The United States did not waive its immunity to this suit in district court by intervening in the original proceedings in this Court in *Arizona* v. *California,* 373 U.S. 546 (1963). Only Congress may waive the immunity of the United States to suit, and such a waiver must be unequivocally expressed. There is no indication in the QTA or in the statutes governing original cases in this Court that Congress intended that the United States would waive its immunity to other suits by participating in such cases.

ARGUMENT

THE DISTRICT COURT DOES NOT HAVE AUTHORITY TO ADJUDICATE THE LOCATION OF THE RESERVATION BOUNDARIES

Our submission in this case concerns only the amenability of the United States and the Secretary of the Interior to suit in the

district court to resolve the boundary issue that underlies the United States' claim of water rights for the disputed 3500-acre portion of the Fort Mojave Indian Reservation. In this respect, the case presents questions of general importance under the Administrative Procedure Act, the Quiet Title Act, and the McCarran Amendment.

Insofar as the underlying water-rights controversy is concerned, however, the consequences of our submission are modest. We do not ask the Court to validate the Secretary's boundary determination on the merits, and we do not suggest that petitioners have no right to challenge that determination in other judicial proceedings. We contend only that petitioners may not do so in *this* suit. A ruling to that effect by this Court would not have a substantially adverse effect on petitioners. The Court made clear in *Arizona* v. *California II* that the Secretary's orders correcting the boundaries of the three Reservations cannot result in an increase in the reserved water rights for the Reservations unless petitioners are first given an opportunity to challenge those orders. 460 U.S. at 636. Because petitioners are barred by sovereign immunity from challenging the Secretary's orders in the instant case, they of course must be afforded a suitable opportunity to do so in another forum—*e.g.*, in this Court, following a renewed motion by the United States (or by petitioners themselves) to amend the decree in *Arizona* v. *California* in a manner that finally determines the boundary issue, or, if appropriate, in other proceedings initiated by the United States for purposes of resolving that issue—before this Court's decree in *Arizona* v. *California* could be amended to recognize additional water rights for the Reservations that could adversely affect the contractual rights of petitioners MWD and Coachella.

The United States has no interest in delaying a final resolution of the boundaries of the three Reservations, and, indeed, the United States urged this Court to determine the boundary of the Hay and Wood Reserve portion of the Fort Mojave Reservation in *Arizona* v. *California I* and urged the Court to give effect to the Secretary's determination of that boundary in *Arizona* v.

California II. Accordingly, if, as we urge, the Court affirms the court of appeals' judgment ordering dismissal of this case, the United States will promptly consider what further steps should be taken to bring about an expeditious resolution of these issues.

I. PETITIONERS MAY NOT OBTAIN A JUDICIAL DETERMINATION OF THE RESERVATION BOUNDARIES IN A SUIT UNDER THE ADMINISTRATIVE PROCEDURE ACT

In this suit, petitioners seek to set aside the Secretary's determination that 3500 acres had been erroneously excluded from the Fort Mojave Indian Reservation. In addition, petitioners request a "declaration that the western boundary of the Camp Mojave Hay and Wood Reserve is the left bank of the Colorado River in its last natural course, excluding the lands of the bed of the Colorado River" (Second Amended Complaint at 21-22; E.R. 21-22). The relief petitioners request would divest the United States of title to the 3500 acres in its capacity as trustee for the Fort Mojave Tribe and would divest the Tribe of its equitable interest in that land. Title would revert to the United States in fee simple, and the United States would hold the 3500 acres as general public lands, administered by the Bureau of Land Management. Accordingly, as the court of appeals observed, the "effect of a successful challenge would be to quiet title in others than the Tribe" (Pet. App. 9a). Moreover, the effect of a judgment in petitioners' favor on the reservation status of the 3500 acres of land would be to divest the United States of its legal title to (and the Tribe of its equitable interest in) the water rights that were reserved for the irrigable portion of that land when it was included as part of the Fort Mojave Reservation.

As this Court observed in another case involving disputed title to real property in which the United States claims an interest, "[t]he States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983). See also

United States v. *Mottaz*, 476 U.S. 834, 851 (1986) (citations omitted) (" '[a] waiver of sovereign immunity "cannot be lightly implied but must be unequivocally expressed" ' "). The petitioner water agencies therefore cannot bring this action against the United States and the Secretary of the Interior to resolve questions concerning either the nature of the United States' title to the 3500 acres or the United States' ownership of reserved water rights for that area, unless Congress has unequivocally waived the immunity of the United States and consented to such an action.

In this case, petitioners principally rely (Pet. Br. 25-36) on a provision of the Administrative Procedure Act, 5 U.S.C. 702, as the requisite waiver of sovereign immunity. This reliance is misplaced. As this Court held in *Block* and *Mottaz*, Congress intended the Quiet Title Act (QTA), 28 U.S.C. (& Supp. IV) 2409a, to be the exclusive basis for suits seeking an adjudication of disputes concerning title to real property in which the United States claims an interest. Petitioners' suit is foreclosed under the QTA because it falls within the express exceptions to the waiver of sovereign immunity under that Act for suits concerning "water rights" and for suits concerning "trust or restricted Indian lands." Moreover, as petitioners concede (Br. 25-26), the QTA does not in any event waive the immunity of the United States to suits brought by parties, such as the petitioner water agencies, who do not even claim an interest in the real property that is the subject of the suit. Because the relief petitioners seek is forbidden by the QTA, the waiver of sovereign immunity in 5 U.S.C. 702 does not authorize the district court to grant that relief in a suit under the APA.

A. The Waiver of Sovereign Immunity Under the APA Does Not Confer Authority To Grant Relief If Another Statute That Grants Consent to Suit Expressly or Impliedly Forbids the Relief Which is Sought

In the 1976 amendments to the APA, Congress enacted a broad waiver of federal sovereign immunity to suits against the United States and its officers seeking judicial review of agency

action and requesting relief other than money damages. Pub. L. No. 94-574, § 1, 90 Stat. 2721, codified at 5 U.S.C. 702. See S. Rep. 94-996, 94th Cong., 2d Sess. 3-12 (1976); H.R. Rep. 94-1656, 94th Cong., 2d Sess. 2-13 (1976); *Bowen* v. *Massachusetts*, No. 87-712 (June 29, 1988), slip op. 11-12; *id.* at 1-2 (Scalia, J., dissenting).[11] In so doing, however, Congress was careful to preserve the limitations on the consent to suit under other statutes in which Congress had more narrowly waived the sovereign immunity of the United States for certain classes of cases. Specifically, the last sentence of 5 U.S.C. 702 provides, in subsection (2), that "[n]othing herein"—*i.e.*, nothing in the APA's general waiver of sovereign immunity—" * * * confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." As the House and Senate reports explained: "[T]he amendment to 5 U.S.C. section 702 is not intended to permit suit in circumstances where statutes forbid or limit the relief sought. * * * If a statute 'grants consent to suit' with respect to a particular subject matter, specific relief may be obtained [under the APA] only if Congress has not intended that provision for relief to be

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[11] Prior to 1976, 5 U.S.C. (1970 ed.) 702 provided:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

In the 1976 amendments, Congress added the following sentence to Section 702:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

As the committee reports cited in the text make clear, the purpose of this sentence was to eliminate the defense of sovereign immunity in civil actions governed by the APA. The next sentence of the amended 5 U.S.C. 702 permits the United States to be named as a defendant (while requiring the judgment to identify the officer against whom the injunction runs), and the final sentence contains two limitations on the waiver of sovereign immunity, 5 U.S.C. 702(1) and (2), that are discussed at pages 19-22 and note 12, *infra*.

exclusive." H.R. Rep. 94-1656, *supra,* at 12-13; S. Rep. 94-996, *supra,* at 11, 12.[12]

In enacting the waiver provision of the APA in 1976, with its explicit limitation, Congress adopted the 1969 proposal of the Administrative Conference of the United States. See H.R. Rep. 94-1656, *supra,* at 4, 12, 23-24, 26-28; S. Rep. 94-996, *supra,* at 3, 12, 22-23, 25-27. In a memorandum supporting its proposal, the Administrative Conference specifically explained the reason for this limitation on the waiver of sovereign immunity:

> The Committee's recommendation is phrased as not to effect an implied repeal or amendment of any prohibition, limitation, or restriction of review contained in existing statutes * * * in which Congress has conditionally consented to suit. While this result would probably have been reached by the preservation of all other 'legal or equitable ground[s]' for dismissal [see 5 U.S.C. 702(1), discussed in note 12, *supra*], which include the designation by Congress of an exclusive remedy or method of review, clause (2) of the final sentence of part (1) of the recommendation is intended to prevent any question on this matter from arising.

Sovereign Immunity: Hearing on S.3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 138-139 (1970) [hereinafter *1970 APA Hearing*]. Congress thus unmistakably expressed its determination that plaintiffs not be permitted to rely on the general waiver of sovereign immunity under the APA to circumvent limitations on the waiver of sovereign immunity in other statutes that address particular subject matters.[13]

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[12] The last sentence of 5 U.S.C. 702, as amended in 1976, also provides that nothing in the waiver of sovereign immunity "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground" (5 U.S.C. 702(1)). This provision, inter alia, preserves the bar to judicial review under the APA itself, where other "statutes preclude judicial review" (5 U.S.C. 701(a)(1)).

[13] The principal examples, cited in the legislative history, of other statutes in which Congress had consented to suit but had expressly or impliedly forbidden injunctive or declaratory relief were the Court of Claims Act, 28 U.S.C. 1491, and the Tucker Act, 28 U.S.C. 1346(a)(2); the legislative history makes clear Congress's understanding that the creation of a damage remedy under those statutes for contract claims "impliedly forbids" a court from ordering specific performance of the contract or other injunctive or declaratory relief. H.R. Rep. 94-1656, *supra*, at 12-13; S. Rep. 94-996, *supra*, at 12. The committee reports also state (*ibid.*) that 5 U.S.C. 702(2) does not affect limitations on specific relief derived from the provision for recovery of damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, as well as limitations on specific relief in tax claims (see 26 U.S.C. 7421) and patent infringement cases. The Administrative Conference's memorandum pointed out that there may well be circumstances under which 5 U.S.C. 702(2) would render specific relief unavailable even though damages or other relief was not available under another statute that grants consent to suit in a general category of cases because of exceptions to the waiver under the other statute—*e.g.*, where a damages action under the FTCA is foreclosed by one of the exceptions in 28 U.S.C. 2680, or where a damages remedy is unavailable under the Tucker Act because the claim is quasi-contractual or restitutionary in nature. See *1970 APA Hearing* 139, 140-141.

The intention of Congress to give full effect to limitations on review under other statutory waivers of sovereign immunity is further underscored by the fact that Congress accepted the recommendation of the Department of Justice that the APA amendment should retain the language in the Administrative Conference's proposal that withholds authority to grant relief under the APA where another statute that grants consent "impliedly" forbids relief as well as where it "expressly" does so.[14] As then-Assistant Attorney General Scalia explained in his letter urging that approach, waiver statutes enacted prior to 1976 were passed against the background of a system that assumed the existence of a general rule of sovereign immunity, and Congress therefore would have had no occasion "expressly" to forbid relief other than that to which it consented under the particular

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[14] The version of the APA bill as originally introduced and considered by the Senate would have narrowed the scope of 5 U.S.C. 702(2) to withhold authority to grant relief only if the other statute granted consent to suit for money damages; that version of the bill also deleted the phrase "expressly or impliedly" in the Administrative Conference proposal. S. Rep. 94-996, *supra*, at 12, 26. In response to the Justice Department's urging, the Senate Committee amended the provision to conform to the Administrative Conference's proposal (*id.* at 12), and it passed the House and Senate in that form.

waiver statute. Assistant Attorney General Scalia further explained that because then-existing statutes that waived the sovereign immunity of the United States in particular categories of cases were enacted against the backdrop of sovereign immunity, "in most if not all cases where statutory remedies already exist, these remedies will be exclusive; that is no distortion, but simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief." H.R. Rep. 94-1656, *supra*, at 28; S. Rep. 94-996, *supra*, at 27.

As we shall now explain, petitioners' attempt to invoke the waiver of sovereign immunity in 5 U.S.C. 702(2) in seeking an adjudication of disputed issues concerning the United States' interests in real property is foreclosed by Congress's decision to preserve limitations on review under other statutes that comprehensively address the waiver of sovereign immunity with respect to a particular subject matter.

B. The Waiver of Sovereign Immunity In 5 U.S.C. 702 Is Inapplicable In This Case Because the Quiet Title Act Is A Statute That Grants Consent to Suit But Expressly or Impliedly Forbids the Relief Petitioners Seek

The Quiet Title Act, which was enacted only four years prior to the 1976 amendments to 5 U.S.C. 702, is precisely the sort of pre-existing waiver statute to which Congress referred when it limited the scope of the APA's waiver of sovereign immunity: The QTA is an "other statute that grants consent to suit" but "expressly or impliedly forbids the relief which is sought" in the instant case. Moreover, this Court has twice held that " 'Congress intended the QTA to provide the *exclusive* means by which adverse claimants could challenge the United States' title to real property' " (*Mottaz*, 476 U.S. at 841 (emphasis added), quoting *Block*, 461 U.S. at 286; see also 476 U.S. at 846). It follows that petitioners cannot avoid the limitations in the QTA by bringing an action under the APA. Indeed, Congress explicitly acknowledged when it amended 5 U.S.C. 702 to address the sovereign immunity issue on a general basis in 1976 that the

QTA already addressed the question of sovereign immunity in the specific context of disputed title to real property in which the United States claim an interest.[15]

Accordingly, the Court in *Block* specifically rejected the contention that a plaintiff may invoke the waiver of sovereign immunity in the 1976 amendments to the APA to avoid the limitations on the waiver of sovereign immunity under the QTA (461 U.S. at 286 n.22). The Court concluded that the QTA is an "other statute" that grants consent to suit within the meaning of 5 U.S.C. 702(2) and that if a suit is untimely under the QTA's 12-year statute of limitations (see 28 U.S.C. 2409a(f)), "the QTA expressly 'forbids the relief' which would be sought under § 702" (461 U.S. at 286 n.22). See also *ibid.*, quoting H.R. Rep. 94-1656, *supra*, at 13 ("§ 702 provides no authority to grant

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[15] The House and Senate Reports state, in identical language:

> Perhaps the only situation under recent case law, other than suits for damages, where it was fairly predictable—and intended by Congress—that a court would uphold a claim of sovereign immunity, involved disputed title to real property. The results in these cases were so obviously unjust that in 1972 with the enactment of legislation also considered and reported by this committee, Congress enacted legislation to permit actions to quiet title to be brought against the United States. 28 U.S.C. sections 1346(f), 1402(d), 2409(a).

H.R. Rep. 94-1656, *supra*, at 8 (footnotes omitted); S. Rep. 94-996, *supra*, at 7-8 (footnotes omitted). The citation of 28 U.S.C. 2409a is significant, because subsection (a) of that section contains not only the QTA's waiver of sovereign immunity but also the exceptions to that waiver for "water rights" and "Indian lands," both of which are applicable here. See pages 24-25, *infra*.

When the APA's waiver of sovereign immunity was first considered by Congress in 1970, prior to enactment of the QTA, cases in which the plaintiff challenges the United States' title to real property were viewed as presenting one part of the broader question whether the sovereign immunity of the United States should be waived as a general matter. However, quiet title cases were viewed as an especially sympathetic category for such a waiver, and both the Department of Justice and the Committee on Judicial Review of the Administrative Conference, in a memorandum prepared by Roger Cramton, suggested special legislation on that discrete subject. *1970 APA Hearing* 66, 69, 117, 126-128, 252. Congress followed that course by enacting the QTA in 1972, at a time when the Department of Justice had not yet lent its support to the general waiver of sovereign immunity in the APA.

relief 'when Congress has dealt in particularity with a claim and [has] intended a specified remedy to be the exclusive remedy' ").

The APA holding in *Block* applies equally here, because this suit too is within the general subject matter addressed by the QTA but likewise is foreclosed by specific limitations under that Act. In the QTA, Congress waived the sovereign immunity of the United States to certain suits to adjudicate disputed title to real property in which the United States claims an interest, but it carefully limited that waiver in a number of respects. 28 U.S.C. (Supp. IV) 2409a.[16] The basic waiver of immunity in the QTA provides (28 U.S.C. (Supp. IV) 2409a(a)):

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666). [17]

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[16] When Congress enacted the QTA in 1972, it conferred jurisdiction on the district courts to entertain suits under the QTA. Pub. L. No. 92-562, § 1, 86 Stat. 1176, codified at 28 U.S.C. 1346(f) ("The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States."). In *California* v. *Arizona*, 440 U.S. 59 (1979), the Court held that the jurisdiction conferred on the district courts by 28 U.S.C. 1346(f) is "exclusive" of the state courts, but not this Court; as a result, the waiver of sovereign immunity under the QTA permits the United States to be named as a defendant in a quiet title action that is otherwise within the original jurisdiction of this Court under 28 U.S.C. 1251 and Article III, Section 2 of the Constitution.

[17] Section 1346 of Title 28 is the general provision conferring jurisdiction where the United States is a defendant, including Tucker Act and FTCA cases; 28 U.S.C. 1347 and 2410 permit suits to partition property in which the United States has an interest and the adjudication of claims concerning property in which the United States has a security interest; 28 U.S.C. 1491 governs the

Under this provision, the waiver of sovereign immunity is withheld here, because the instant suit is barred by the express exceptions for suits involving "water rights" and "Indian lands." Moreover, other provisions of the QTA make clear that Congress did not permit third parties who do not even claim an interest in the real property in which the United States claims an interest to bring about an adjudication of a dispute concerning title to that property.

1. *The Exception for Suits Involving "Water Rights"*

a. The relief petitioners MWD and Coachella seek in this case—a judicial decree setting aside the Secretary's determination of the western boundary of the Hay and Wood portion of the Fort Mojave Reservation—would divest the United States of its title to 3500 acres of land in its capacity as trustee for the Fort Mojave Tribe and would divest the Tribe of its equitable interest in that land. But petitioners do not seek review of the Secretary's order for purposes of establishing the legal or equitable ownership of the land for its own sake, because they claim no interest in the land. Petitioners are interested in the boundary issue only because it has a direct bearing on their challenge to the United States' claim of a right to water from the lower Colorado River: if the 3500 acres of land are part of the Fort Mojave Reservation, then, under *Arizona* v. *California I,* the United States has a reserved right to sufficient water to irrigate all land within the 3500-acre area that is found to be practicably irrigable. Thus, a challenge to the Secretary's determination that the land was reserved for the benefit of the Indians is merely one element of petitioners' true cause of action, which is a challenge to the United States' ownership of reserved water rights. It is only because of the possible effect of the United States' reserved water rights on MWD's and Coachella's contractual water rights that they could even have Article III standing to bring this suit,

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jurisdiction of the Claims Court; and 43 U.S.C. 666, popularly known as the McCarran Amendment, grants the consent of Congress to name the United States as a defendant in a general adjudication of all of the rights to the use of water in a river system or other source (see pages 26-27, *infra*).

and petitioners in fact acknowledge (Br. 46) that they brought this suit challenging the Secretary's boundary determinations "*solely* to determine water rights" (emphasis in original). This case therefore falls within the express exception in the QTA that preserves the sovereign immunity of the United States to civil actions seeking an adjudication of "water rights" claimed by the United States. 28 U.S.C. (Supp. IV) 2409a(a).

As petitioners point out (Pet. 44), the "water rights" exception was incorporated into the QTA from the draft bill submitted by the Department of Justice. In urging adoption of the Justice Department bill, the Attorney General explained that the waiver of sovereign immunity under the QTA "does not apply to civil actions * * * involving or relating to water rights." H.R. Rep. 92-1559, 92d Cong., 2d Sess. 10 (1972); see also S. Rep. 92-575, 92d Cong., 1st Sess. 6 (1971). And petitioners in fact expressly *concede* (Br. 44-45) that "the District Court suit below is clearly an action 'involving or relating to water rights' inasmuch as the determination of an Indian reservation boundary is the essential first step in the adjudication of the 'practicably irrigable acreage' within the boundaries of an Indian reservation which is entitled to a *Winters* right." [18] Petitioners further concede (Br. 45) that they seek, in essence, "a *partial* adjudication of the essential elements of the water rights of the three reservations—the boundary portions" (emphasis in original). Contrary to petitioners' contention, however, they cannot avoid the preclusive effect of the "water rights" exception to the QTA's waiver of sovereign immunity by splitting their cause of action and seeking an adjudication of only one of its elements: the reserved status of the land for which the United States claims it has reserved water rights. The preclusion of the whole necessarily includes a preclusion of its constituent parts. Because the QTA therefore "expressly forbids" the relief petitioners seek, that relief is not authorized by the APA's waiver of sovereign immunity under 5 U.S.C. 702.

b. Although Congress has withheld its consent under the QTA to suits seeking an adjudication of water rights claimed by

[18] See *Winters* v. *United States*, 207 U.S. 564 (1908).

the United States, Congress elsewhere has consented to such suits in certain limited circumstances. In Section 208 of the Act of July 10, 1952, ch. 651, 66 Stat. 560, codified at 43 U.S.C. 666, popularly known as the McCarran Amendment, Congress gave its consent "to join the United States as a defendant in any suit * * * for the adjudication of rights to the use of water of a river system or other source * * *." However, as this Court held in *Dugan* v. *Rank*, 372 U.S. 609 (1963), the McCarran Amendment grants Congress's consent to join the United States as a defendant only in "a case involving a *general* adjudication of 'all of the rights of various owners on a given stream' " (*id.* at 618 (quoting S. Rep. 755, 82d Cong., 1st Sess. 9 (1951) (emphasis in original)). Accord, *United States* v. *District Court for Eagle County*, 401 U.S. 520, 525 (1971); see also *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 819 (1976) ("comprehensive" adjudication); *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 569 (1983) ("comprehensive state adjudications"). As the court of appeals held, "[t]his suit is not such a general adjudication" (Pet. App. 11a). In the first place, petitioners do not request the district court actually to adjudicate *any* party's water rights as such; they merely seek adjudication of one element of a reserved water-rights claim. Moreover, petitioners seek an adjudication of the rights of only *one* water user on the lower Colorado (the United States), and only as regards some of that party's water rights (those reserved for the disputed portions of the Indian Reservations). Thus, like the plaintiffs in *Dugan* v. *Rank*, the petitioner water agencies brought this action to determine water rights solely between themselves and the United States, and only incompletely at that. This therefore is not a general adjudication of all of the rights to water from the Colorado River, and it follows that the McCarran Amendment does not furnish the necessary consent to suit.

By waiving the United States' immunity to suits challenging the United States' water rights only in general stream adjudications, the McCarran Amendment withholds consent to other suits challenging the United States' water rights. Accordingly, for purposes of the limitation on the APA's general waiver of

sovereign immunity in 5 U.S.C. 702(2), the McCarran Amendment, like the QTA, is an "other statute that grants consent to suit" in a general class of cases concerning a category of interests in real property, but the McCarran Amendment "impliedly forbids" relief insofar as the petitioner water agencies seek only a "partial" adjudication of water rights (see Pet. Br. 45). Thus, the McCarran Amendment reinforces our conclusion in point a, *supra,* based on the "water rights" exception in the QTA, that the APA's general waiver of sovereign immunity does not authorize the court to grant relief in this case.

That interpretation is supported by the legislative history of 5 U.S.C. 702(2) as well. The Administrative Conference of the United States, in its memorandum supporting its recommendation that Congress amend the APA to waive sovereign immunity to certain suits challenging agency action, specifically discussed the Court's holding in *Dugan* v. *Rank* that the United States had not consented to that suit under the McCarran Amendment (*1970 APA Hearing* 113). Significantly, moreover, the Administrative Conference's memorandum stated that the proposed waiver of sovereign immunity would not extend to suits concerning water rights. See *1970 APA Hearing* 139-140 (emphasis added) ("Special statutory remedies having the same character [as the Court of Claims Act and the Tucker Act], such as those dealing with Indian claims, patent infringement, *water rights,* and the like retain the same preclusive effect on other remedies that they have now"). The committee reports on the 1976 amendments to the APA also refer to the sovereign immunity ruling in *Dugan* v. *Rank* (H.R. Rep. 94-1656, *supra,* at 6 (quoting Letter from Assistant Attorney General Scalia)); see also S. Rep. 94-996, *supra,* at 5 (same). Although the committee reports do not specifically refer to the McCarran Amendment aspect of *Dugan* v. *Rank,* they express no disagreement with the conclusion of the Administrative Conference, which proposed the exception in 5 U.S.C. 702(2), that the APA's waiver of sovereign immunity would not affect limitations on "[s]pecial statutory remedies" dealing with "water rights"; as petitioners concede (Br. 44), the McCarran Amendment was the most prominent (whether or not the only) example of such a statute.

It also is significant that Congress did not disturb the special and limited statutory regime for the adjudication of water rights under the McCarran Amendment when it enacted the QTA: Section 2409a(a) expressly provides that the QTA does not "apply to or affect actions which may be or could have been brought under * * * section 208 of the Act of July 10, 1952 (43 U.S.C. 666)." When Congress enacted the QTA in 1972, the Court had already held in *Dugan* v. *Rank* and reaffirmed in *Eagle County* that the waiver of sovereign immunity in the McCarran Amendment applies only to general stream adjudications. Congress should be presumed to understand the state of existing law when it legislates. *Bowen* v. *Massachusetts,* slip op. 15; *Cannon* v. *University of Chicago,* 441 U.S. 677, 696-697 (1979). The express exception in the QTA for suits involving "water rights" claimed by the United States therefore reflects Congress's determination even prior to the enactment of the APA's waiver of sovereign immunity in 1976 that the adjudication of water rights in a suit brought against the United States should continue to be permitted only in the context of a general stream adjudication. This conclusion is reinforced by the testimony of the Justice Department witness concerning the reference to the McCarran Amendment in the QTA:

> There is existing authority to sue the United States for the adjudication of water rights. This is under 43 U.S.C. 666. So, not wishing to disturb the existing law, as to that grant of consent, there was included in the bill an additional exception as to suits relating to property with respect to which the United States claims water rights.

Suits to Adjudicate Disputed Titles to Land in Which the United States Claims an Interest: Hearing on S. 216, et al., Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 92th Cong., 2d Sess. 60 (1972) [hereinafter *House QTA Hearing*]. See also *id.* at 52, 55; S. Rep. 92-575, *supra,* at 6; H.R. Rep. 92-1559, *supra,* at 3 & n.1, 6, 10.[19]

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[19] Petitioners cite (Br. 46) *Colorado River Water Conservation District* and *San Carlos Apache Tribe* for the proposition that "the McCarran Amend-

ment did not make general stream adjudications the exclusive vehicle for resolving water rights claims"; from this premise, petitioners argue that the McCarran Amendment does not foreclose them from bringing an action under the APA seeking an adjudication of the United States' water rights. Petitioners cannot make this leap. *Colorado River Water Conservation District* and *San Carlos Apache Tribe* concerned the jurisdiction of the district court to adjudicate the United States' reserved water rights in suits brought by the United States or the Indian Tribes for whose benefit the water rights were reserved. Neither decision supports the proposition that a third party may bring an action against the United States seeking an adjudication of water rights it holds in trust for an Indian tribe. Such a suit must overcome the sovereign immunity of the United States, which is the subject addressed by the McCarran Amendment.

In addition, petitioners err in relying (Br. 46) on *South Delta Water Agency* v. *United States Dep't of Interior*, 767 F.2d 531, 540-541 (9th Cir. 1985). There, the Ninth Circuit held that sovereign immunity did not bar an action to require the Secretary of the Interior to operate certain facilities of the Central Valley Project in California in accordance with state law and in a manner that did not interfere with the rights of other water users. The plaintiffs in *South Delta* did not challenge the *United States'* title to land or water rights, and that suit (unlike this one) therefore was not affected by either the consent to suit in the QTA or the corresponding limitations on that consent (see 767 F.2d at 541-543). Similarly, in *Joint Board of Control of the Flathead Mission & Jocko Irrigation Districts* v. *United States*, 832 F.2d 1127 (9th Cir. 1987), also cited by petitioners (Br. 46), the court disavowed any purpose to adjudicate water rights (832 F.2d at 1130). Rather, that case involved a challenge to the Secretary's operation of a project to protect Indian fishery interests.

For the same reason, petitioners' reliance (Br. 45) on *Dugan* v. *Rank* is misplaced. That case did not involve an adjudication of water rights claimed by the United States; to the contrary, as we have explained (see page 28, *supra*), the Court specifically held that the McCarran Amendment did not permit such an adjudication (372 U.S. at 617-619). *Dugan* v. *Rank* instead involved a suit seeking to prevent the federal defendants from interfering with the *plaintiffs'* water rights. Application of the "water rights" exception in the QTA turns on the interest claimed by the United States, not the plaintiff. *House QTA Hearing* 51-52, 55, 59-60; compare *Mottaz*, 476 U.S. at 842-843. Petitioners cite no other case to support their assertion (Br. 45) that, prior to the QTA, a party would have been permitted to resort to an officer's suit to obtain an adjudication of the United States' water rights. In any event, because the QTA is now the exclusive basis for adjudicating disputes concerning the United States' interests in real property (except for the McCarran Amendment and the other statutory provisions referred to in the QTA itself), and because the QTA does not permit suits concerning the United States' water rights, it is irrelevant whether such a suit could have been brought prior to enactment of the QTA in 1972. Compare *Block*, 461 U.S. at 284-286.

c. Against this background, there is no merit to petitioners' contention (Br. 43-47) that the decision below frustrates congressional objectives concerning the orderly adjudication of Indian water rights. As this Court has held, the congressional policy, as embodied in the McCarran Amendment, is to facilitate comprehensive rather than piecemeal adjudication of rights to the use of water in river systems and other sources in which the United States claims water rights. See *Colorado River Water Conservation District*, 424 U.S. at 819-820; *San Carlos Apache Tribe*, 463 U.S. at 569-570. The "water rights" exception in the QTA furthers that policy. This congressional scheme would be substantially undermined if parties were permitted to institute an adjudication of the United States' water rights in a manner that would be piecemeal not only in the sense that not all water rights would be determined, but also in the sense that not even all the elements of one water right claim would be adjudicated.[20] Contrary to petitioners' contention, therefore, the decision below is fully consistent with congressional policy concerning the adjudication of water rights.

2. *The Exception for "Trust or Restricted Indian Lands"*

This suit is equally barred even if its fundamental character as a partial water rights adjudication is ignored and the suit is regarded as nothing more than a challenge to the boundary of the land that is part of the Fort Mojave Reservation. That is so because this case also falls within the express exception in the QTA for suits involving "trust or restricted Indian lands."

a. As this Court has explained, the Indian lands exception operates "to retain the United States' immunity from suit by

[20] Under our submission, the absence of authority of a court to award relief under 5 U.S.C. 702 in a case involving an adjudication of the United States' "water rights" is not limited to water rights reserved for the benefit of Indians. Accordingly, and contrary to petitioners' assertion (Br. 46-47), petitioners likewise could not invoke the APA's waiver of sovereign immunity to challenge a determination by the Secretary concerning the boundary of a wildlife reservation, national forest, or other federal reservation where, as here, the purpose of that challenge is "*solely* to determine water rights" (*ibid.* (emphasis in original)).

third parties challenging the United States' title to land held in trust for Indians" (*Mottaz,* 476 U.S. at 842). Petitioners do not dispute that, as a result of the Secretary's determination that the 3500 acres in question are part of the Fort Mojave Reservation as originally established, those lands are now "held in trust for Indians" by the United States.

To be sure, petitioners contend in this suit that the land should *not* be held in trust for Indians and that it instead is part of the public domain, to be administered by BLM.[21] But that of course is the very issue to be decided on the merits if this suit is permitted to proceed. At this stage, the case presents only the threshold issue of whether the "Indian lands" exception to the QTA expressly forbids the relief MWD and Coachella seek, and thereby precludes this suit under the APA. That threshold issue turns on the nature of the interest the United States asserts in the property. This is apparent from the very text of the QTA, which, in 28 U.S.C. (Supp. IV) 2409a(a), authorizes suits "to adjudicate a disputed title to real property in which the United States *claims an interest*" (emphasis added).[22] Indeed, this Court adopted that interpretation in *Mottaz*, stating that "when the United States *claims* an interest in real property based on that property's status as trust or restricted Indian land, the Quiet Title Act does not waive the government's immunity" (*Mottaz,*

[21] More precisely, petitioners contend that the land should not be held in trust for Indians on the basis of the Secretary's 1974 determination, which found that the disputed land is part of the Reservation as set aside for the Indians in 1890, because any water rights reserved for use on that land would then have a priority date of 1890. Petitioners state (Br. 34) that they "would not and probably could not" challenge a policy decision to add the 3500 acres to the Fort Mojave Reservation at the present time. Such an addition of the lands to the Reservation with a current effective date of course would render any water rights reserved in connection with that addition junior to the contractual rights of MWD and Coachella.

[22] The fact that the existence of jurisdiction under the QTA turns on the interest the United States claims is textually reconfirmed in 28 U.S.C. (Supp. IV) 2409a(e), which provides that "[i]f the United States disclaims all interest in the real property or interest therein adverse to the plaintiff," and if the disclaimer is confirmed by court decree, the jurisdiction of the district court under the QTA shall cease.

476 U.S. at 843 (footnote omitted; emphasis added)). As we have noted, petitioners do not, and cannot, dispute that the United States claims an interest in the real property at issue here on the basis of its status as trust land. It follows that the relief petitioners seek in the instant suit – a judicial order setting aside the Secretary's determination that the 3500 acres in question are Indian lands and a judicial declaration of the western boundary of the Hay and Wood Reserve that excludes the 3500 acres from the Fort Mojave Reservation – is expressly forbidden by the "Indian lands" exception to the QTA and therefore is not authorized by the APA's waiver of sovereign immunity in 5 U.S.C. 702.

This conclusion also is supported by the purposes underlying the "Indian lands" exception. When Congress enacted the QTA, it retained the United States' immunity to suits involving Indian lands (*Minnesota* v. *United States,* 305 U.S. 382, 385-387 (1939)) in order to prevent third parties from disrupting commitments made by the United States to Indian people. *Block* v. *North Dakota,* 461 U.S. at 283; *Mottaz,* 476 U.S. at 842-843 & n.6; Pet. App. 9a-10a. This purpose is explained in the letter from the Solicitor of the Interior urging the adoption of this provision, which was part of the draft bill submitted by the Justice Department:

> [T]he Justice proposal specifically excludes land held in trust for Indians and Indian restricted lands. The Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

H.R. Rep. 92-1559, *supra,* at 13; S. Rep. 92-575, *supra,* at 4.[23]

[23] The Justice Department's proposals (see S. Rep. 92-575, *supra,* at 7-8) were largely adopted by Congress, and they formed the basis for the QTA as

See also *Dispute of Titles on Public Lands: Hearing on S. 216, S. 579, and S. 721 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. 2, 19 (1971) [hereinafter *Senate QTA Hearing*]; *House QTA Hearing 22, 43, 47, 52, 55-56.*[24] Compare *County of Oneida* v. *Oneida Indian Nation,* 470 U.S 226, 233-236, 244 (1985). Similarly, the Court explained in *Mottaz* that Congress enacted the Indian lands exception because it was concerned that "[a] unilateral waiver of the Federal Government's immunity would subject these lands to suit without the Indians' consent" (476 U.S. at 843 n.6). It would be inconsistent with these congressional purposes to permit petitioners' suit to proceed under the APA, because it would enable third parties to disrupt the solemn commitments made by the United States to the Fort Mojave Tribe in the 1890 Executive Order, as now construed by the United States, and it would subject the 3500 acres in question to suit without the Indians' consent.

The importance of preventing circumvention of the limitations on the waiver of sovereign immunity under the QTA was stressed in *Block* v. *North Dakota,* in which the Court held that the QTA precludes a party from bringing a suit against the federal officer responsible for administering property claimed by the United States in order to resolve a dispute concerning the United States' title to that property. See 461 U.S. at 281-286. If it were otherwise, the Court stressed, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted" (461 U.S. at 284-285). In particular, the Court pointed out that if it "were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception

finally enacted (*Block*, 461 U.S. at 283-284). The "Indian lands" exception was enacted in the same form in which it was proposed by the Department of Justice.

[24] The transcript of the *House QTA Hearing* was released by the House Judiciary Committee in 1978. Although that transcript therefore is not printed and bound with the transcripts of other hearings conducted by the Committee during the 92d Congress, it is available on microfiche through the Congressional Information Service, Serial No. H521-37.

to the QTA would be rendered nugatory" (*id.* at 285). The same would be true here if petitioners were permitted, by suing the Secretary of the Interior, to bring about an adjudication of the nature of the federal government's title. And as the Court further held in *Block* (461 U.S. at 286 n.22), the 1976 amendments to 5 U.S.C. 702 do not permit a party to avoid the limitations under the QTA by bringing a suit under the APA.

Prior to its decision in the instant case, the Ninth Circuit had held that, under *Block*, the QTA is the exclusive avenue for resolution of all boundary disputes with the federal government, because the location of the boundary delineates the government's claim of an interest in the property enclosed. *Fadem* v. *United States,* 791 F.2d 1381, 1382-1383 (1986). That holding is fully supported by the legislative history of the QTA, which demonstrates that Congress expected that "[p]erhaps the most common application of the proposed statute would be in boundary disputes between the United States and owners of adjacent property." H.R. Rep. 92-1559, *supra*, at 6; see also *id.* at 9 (letter from the Attorney General); S. Rep. 92-575, *supra*, at 5 (same). In fact, the impetus for enactment of the QTA was a boundary dispute between the United States and private landowners that resulted from a resurvey of lands along the Snake River in Idaho that was undertaken pursuant to the Secretary's resurvey authority under 43 U.S.C. 772 (see *Senate QTA Hearing* 38; *House QTA Hearing* 26), the same statute under which the resurvey of the Hay and Wood Reserve was made.[25] See generally *California* v. *Arizona,* 440 U.S. at 67 n.7; *Senate QTA Hearing* 7-18, 33-55; *House QTA Hearing* 2-42.

The Ninth Circuit's decision in the instant case simply applies the foregoing principles to a dispute over the location of a boundary that encloses lands held in trust for Indians: Because the QTA expressly bars suits concerning title to Indian trust lands, it necessarily bars this suit concerning the location of a boun-

[25] The resurvey in the instant case also was authorized by 25 U.S.C. 176, which grants the Secretary authority to survey Indian lands in conformity with rules and regulations under which other public lands are surveyed (*e.g.*, 43 U.S.C. 772).

dary that encloses such lands. See also *Carlson* v. *United States*, 556 F.2d 489, 491-492 (Ct. Cl. 1977); *Carlson* v. *Tulalip Tribes*, 510 F.2d 1337, 1339 (9th Cir. 1975); *Newman* v. *United States*, 504 F. Supp. 1176, 1178-1180 (D. Ariz. 1981). The fact that the Indian lands exception would operate in this manner and bar suits concerning the boundaries of trust or restricted Indian lands was specifically brought to the attention of Congress during the hearings.[26]

b. Petitioners contend (Br. 36-43) that even if the limitations in the QTA are applicable here, the Ninth Circuit misapplied the "Indian lands" exception in the circumstances of this case. Petitioners rely on *Spaeth* v. *Secretary of Interior*, 757 F.2d 937 (8th Cir. 1985), where the court held that in order to invoke the Indian lands exception, the United States must make a threshold showing that there is a "substantial possibility" that the lands in question are in fact trust or restricted Indian lands (*id.* at 943). Petitioners contend that the United States has not demonstrated such a "substantial possibility" here and that MWD's and Coachella's suit under the APA therefore should be permitted to proceed in order conclusively to resolve the title question. That argument is unavailing for several reasons.

i. First, there is no reason to resolve this issue here, because the Indian lands exception in the QTA is not the only source of the bar to the district court's authority to grant petitioners relief. As we have explained, the "water rights" exception in the QTA also expressly forbids this suit (and the McCarran Amendment impliedly does so), and as we shall explain (see pages 40-45, *infra*), the QTA also forbids the granting of relief unless the

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[26] See *Senate QTA Hearing* 58 (remarks of a representative of Title Insurance and Trust Co.):

> In connection with the administration bill, paragraph A of the proposed section 2409A provides that the section does not apply to trust or restricted Indian lands. It is not clear to us why these lands were omitted from the effect of the bill because the boundaries of restricted Indian lands are just as much of a problem as are other public lands or formerly public lands.

See also *House QTA Hearing*, 47, ~~quoted~~ Note at page 27, *infra*.

plaintiff claims an interest in the property that is the subject of the suit. Accordingly, even if petitioners were correct that the *Spaeth* test should apply and is not satisfied here, this suit must be dismissed.

ii. Second, the Eighth Circuit in *Spaeth* did not identify any basis in the QTA for its conclusion that the United States must demonstrate a "substantial possibility" that the lands are trust or restricted Indian lands. The Eighth Circuit merely cited *Newman* v. *United States*, 504 F. Supp. 1176, 1179 (D. Ariz. 1981) (see 757 F.2d at 943), which does not in any event survive the Ninth Circuit's subsequent decision in *Wildman* v. *United States*, 827 F.2d 1306 (1987), discussed below. Nor did the court in *Newman* identify any basis in the QTA for its threshold test. The district court there simply stated that the United States' claim must be "substantial," relying on several decisions of this Court that discussed the merits of the government's claim in the course of holding the respective suits barred by sovereign immunity. See 504 F. Supp. at 1179, citing *Louisiana* v. *Garfield*, 211 U.S. 70, 77-78 (1908); *New Mexico* v. *Lane*, 243 U.S. 52 (1917); *Morrison* v. *Work*, 266 U.S. 481, 485 (1925). However, to the extent that this Court's discussion of the issues raised by the government's claim in the cases cited in *Newman* suggests the need for any threshold inquiry at all, it suggests only that a court might determine whether the government's claim of an interest in the property is more than a bare assertion—*i.e.*, that it is substantiated by some supporting rationale—and, perhaps, that the claim is non-frivolous. It is not clear, in fact, that the district court in *Newman* intended anything more by its use of the word "substantial." Compare *Hagans* v. *Lavine*, 415 U.S. 528, 537-538 (1974) (a claim is "insubstantial," and therefore will not support federal jurisdiction, if it is frivolous or completely foreclosed by prior decisions); see also *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681-682 n.12 (1986) (same). In *Spaeth*, however, the Eighth Circuit appeared to suggest a more rigorous standard, under which the United States must demonstrate a substantial possibility of succeeding on the merits of the claim that the property is trust or restricted Indian lands. At least to the extent the Eighth Circuit intended to require more than a showing that the claim is non-

frivolous, that approach finds no support in the QTA in particular or in principles of sovereign immunity in general.

As we have shown, this Court made clear in *Mottaz,* which was decided after *Spaeth,* that "[w]hen the United States *claims* an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the government's immunity" (476 U.S. at 843 (emphasis added; footnote omitted)). As a result, the protection afforded to the United States and the Tribe by the Indian lands exception turns on the nature of the United States' claim, not on whether a court finds a "substantial possibility" that the United States would ultimately prevail on that claim if the case were to proceed to the merits.[27] This interpretation also is apparent from the language of the QTA waiver itself, which consents to suit (with the specified exceptions) with respect to property in which the United States "claims an interest." 28 U.S.C. (Supp. IV) 2409a(a). See also 28 U.S.C. (Supp. IV) 2409a(e).

The mischief of the rule petitioners urge is demonstrated by *Spaeth* itself, in which the Eighth Circuit ordered the district court to conduct an elaborate inquiry into numerous issues of law and fact bearing on the merits of the claim, in order to determine whether the suit was barred by the Indian lands exception. See 757 F.2d at 943-945. However, as the Ninth Circuit observed in *Wildman*, "[t]he immunity of the government applies whether the government is right or wrong," and "[t]he very purpose of the doctrine is to prevent a judicial examination of the merits of the government's position" (827 F.2d at 1309). As the court of appeals held in this case, the United States is not

[27] A representative of the California Land Title Association pointed out during the hearings that the "Indian lands" exception would bar an inquiry into whether particular property in fact is Indian land (*House QTA Hearing* 47):

> [T]he bill is presently structured to exclude its application to trust or restricted Indian lands and if, for policy reasons, it is desired to continue this exclusion you will hear no objection from us – other than a mild protest that many situations revolve around questions of whether or not some area is, in fact, Indian lands and that in fairness these questions should also be allowed to be settled – if the bill is fair in one area, it is also fair elsewhere.

" 'to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the Government declares that it is the trustee for Indians' " (Pet. App. 10a-11a (quoting *Wildman*, 827 F.2d at 1309)).[28]

The claim that the lands in the resurveyed area of the Hay and Wood Reserve are "trust or restricted Indian lands" is plainly "colorable" and non-frivolous. The 1870 order describing the Hay and Wood Reserve states that it contains the full 9114 acres the Secretary now recognizes and specifies the courses and distances upon which the Secretary relied in his 1974 order. On this basis, the district court expressly found that there are "genuine issues" of material fact and a "lively dispute" regarding the boundaries and the acreage intended to be included in the Reservation when it was established (Pet. App. 16a, 25a). Moreover, the Secretary of the Interior made a formal determination, based on an exhaustive analysis of numerous documents, that the land in question is held in trust for the benefit of an Indian Tribe; in *Spaeth,* there was no such formal determination that the lands in question were held in trust for the benefit of Indians (see 757 F.2d at 942-946). These circumstances are more than sufficient not only to render the claim in the instant case "colorable," but also to give rise to a "substantial possibility" (under a broad reading of *Spaeth*) that the 3500 acres are in fact Indian trust lands.

iii. Finally, in *Spaeth,* the Eighth Circuit acknowledged that its analysis of the jurisdictional issue was "affected by the extremely unusual facts" of the case (757 F.2d at 945): *i.e.,* that the hardship of the immunity rule bore heavily on the non-Indian plaintiffs, because they were in possession of the property in question and recent developments created a sudden and sharp change in the prior understanding of the governing legal principles upon which the plaintiffs had relied (*id.* at 945-946). Here, by contrast, petitioners are not in possession of and claim

[28] We understand the word "colorable" in this passage to mean non-frivolous. Compare *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982) (opinion of Stevens, J.); *id.* at 712-714 (White, J., dissenting).

no interest whatever in the 3500 acres, and the Secretary's boundary determination creates no immediate hardship for them—especially since no reserved water right will be recognized for the lands in question unless and until this Court amends its decree in *Arizona* v. *California,* and petitioners concededly must be afforded an opportunity to contest the Secretary's boundary determination in some forum before such an amendment will take place. Thus, the practical and equitable considerations that underlay the Eighth Circuit's decision in *Spaeth* furnish no basis for fashioning a novel prerequisite for invoking the Indian lands exception in the circumstances of this case.

3. *The Limitation of Relief to Parties Claiming an Interest in the Property*

Petitioners also argue (Br. 25-32) that the QTA's preservation of immunity to suits challenging the United States' title to "water rights" and "Indian lands" does not foreclose this action under the APA because petitioners do not themselves claim title to the 3500 acres in question or seek to divest the United States of title. Instead, petitioners argue, they merely seek to have the 3500-acre tract transferred from one category of federal lands (those held in trust for Indians) to another (non-Indian public lands). This effort to avoid the limitations under the QTA is unavailing.

As an initial matter, petitioners clearly *do* seek to divest the United States of its legal title to (and the Tribe of its equitable interest in) a species of real property—the reserved water rights the United States claims for the practicably irrigable acreage within the redetermined boundary. Moreover, even with respect to the land alone, petitioners seek to have the district court set aside the Secretary's determination that the 3500 acres constitute part of the Fort Mojave Indian Reservation as it was originally established in 1890. If the district court entered such an order, the nature of the United States' title would change, because it would no longer own those 3500 acres in trust for the benefit of the Fort Mojave Tribe and the Tribe would lose all interest in the land. To be sure, the lands then would have the status of

public lands managed by BLM, and, as such, would be owned in fee simple by the United States. But the happenstance in this case that the 3500 acres, having lost their character as Indian lands, would remain in federal ownership—of an entirely different character—hardly supports petitioners' argument for avoiding the QTA's bar to suits that challenge the status of Indian lands in the first place. The general waiver of sovereign immunity under the QTA applies to any civil action "to adjudicate a disputed title to real property in which the United States claims an interest" (28 U.S.C. (Supp. IV) 2409a(a)). This case presents such a question of "disputed title"—namely, whether the United States' title is in fee simple absolute or is instead held for the benefit of the Fort Mojave Tribe. In short, this suit seeks to change fundamentally the character of the United States' ownership of the land and to sever completely the Tribe's connection to it.[29]

It also is irrelevant for present purposes that petitioners do not assert an interest in the 3500 acres that are the subject of this

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[29] Petitioners in effect seek to assert an interest of the United States in claiming fee ownership of the 3500 acres, in derogation of the Tribe's beneficial interest. There is no reason to believe that Congress intended to permit third parties to invoke the jurisdiction of the courts in order to advance the government's interests in this manner.

The only authority petitioners cite for the proposition that the QTA is inapplicable where the plaintiff does not seek to divest the United States of title is *Pueblo of Taos* v. *Andrus*, 475 F. Supp. 359 (D.D.C. 1979). See Pet. Br. 32, 35. In that case, the Pueblo challenged the government's determination of a boundary between the Pueblo's land and Forest Service land, contending that the disputed area should be regarded as Indian trust land rather than Forest Service land. The district court, believing that the suit would be barred by the Indian lands exception to the QTA if the QTA applied, concluded that the suit was not governed by the QTA because it did not actually seek to divest the United States of title. 475 F. Supp. at 365. However, under this Court's subsequent decision in *Mottaz* (476 U.S. at 842-843), the *Pueblo of Taos* suit was not barred by the Indian lands exception to the QTA, because the United States did not claim title to the disputed land as Indian trust lands. The impetus for the rationale of *Pueblo of Taos* therefore no longer obtains. Moreover, the decision in *Pueblo of Taos* was rendered without the benefit of this Court's subsequent holdings in *Block* and *Mottaz* that the QTA is the exclusive means for challenging the United States' title.

suit. As the court of appeals explained, although petitioners "may not be seeking to quiet title to the land in [themselves,] * * * [t]he effect of a successful challenge would be to quiet title in others than the Tribe" (Pet. App. 9a). As a result, "[t]o allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them" (*id.* at 10a). That is precisely the consequence that Congress sought to avoid by including in the QTA the bar to suits challenging the trust status of land that the United States claims on behalf of Indians. And it therefore is, in turn, precisely the consequence that Congress sought to avoid by providing in 5 U.S.C. 702(2) that nothing in the APA's waiver of sovereign immunity "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[30]

Moreover, the fact that petitioners claim no interest in the disputed property invokes yet another limitation on the waiver

[30] Contrary to petitioners' contention (Br. 32-33), nothing in the decision below affects the authority of a court in a criminal prosecution or habeas corpus action to consider the question of the political boundaries of a reservation for purposes of determining the criminal jurisdiction of the federal, state or tribal government. Questions of sovereign immunity do not arise in a criminal prosecution, because the government is the plaintiff, not the defendant, and because the defendant must in any event be permitted to contest the jurisdiction of the court to entertain the prosecution. Nor would the ruling on the question of the political boundaries of an Indian reservation in a criminal prosecution (at least one brought by a state or tribe) bind the United States in a subsequent civil action concerning title to land within the reservation. For these reasons, *Solem* v. *Bartlett*, 465 U.S. 463 (1984), cited by petitioners (Br. 33), is inapposite. There, in determining whether a state court had criminal jurisdiction, the Court considered whether Congress, by statute, had diminished the political boundaries of an Indian reservation; the Court did not address questions of title, and the crime in that case in fact took place on non-Indian land within the reservation. In *Navajo Tribe* v. *New Mexico*, 809 F.2d 1455 (10th Cir. 1987), also cited by petitioners (Br. 32), the court held that the QTA is the exclusive avenue for challenging the United States' title to land (*id.* at 1468-1469); in the passage quoted by petitioners, the court stated that an adjudication of boundaries is conceptually distinct from an adjudication of title because boundary questions may affect political jurisdiction (*id.* at 1475). Here, by contrast, only the question of title is involved.

of sovereign immunity under the QTA. As petitioners concede (Br. 26, 27-29), Congress permitted challenges to the United States' claim of title to real property to be brought under the QTA only by parties who themselves claim an interest in the same property. See *Kinscherff* v. *United States*, 586 F.2d 159 (10th Cir. 1978); *City of Sault Ste. Marie* v. *Andrus*, 458 F. Supp. 465, 470-472 (D.D.C. 1978); *Landow* v. *Carmen*, 555 F. Supp. 195, 197 (D. Md. 1983); *Middlefork Ranch, Inc.* v. *Butz*, 393 F. Supp. 624 (D. Idaho 1975); cf. *Prater* v. *United States*, 618 F.2d 263 (5th Cir. 1980). This limitation is evident from the requirement that the complaint in a QTA action "shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property" (28 U.S.C. (Supp. IV) 2409a(d)). Petitioners contend, however, that because this limitation forecloses their suit under the QTA, they should be permitted to challenge the United States' title in a suit under the APA. Petitioners draw the wrong lesson from the foreclosure of review under the QTA.

The purpose of the QTA is to subject the United States' claim of title to adjudication by a court where there is a party who [illegible] an adverse claim to the same property and who therefore may suffer hardship as a result of his inability to remove a cloud on his title to that property. See H.R. Rep. 94-1656, *supra*, at 8, and S. Rep. 94-996, *supra*, at 7-8, both quoted at note 15, *supra*. Without such a limitation, the United States would be exposed to numerous lawsuits by various third persons who might wish to bring about the resolution of a controversy concerning the United States' claim of title but who have no competing claim to the same property. Such suits do not present the potential for hardship or concrete adversity regarding a particular parcel that would warrant subjecting the Executive Branch, the courts, and third parties (such as the respondent Tribes in this case) to the burdens of suit—especially where, as here, the parties who *do* have a direct stake in the question of title to the land (the United States and the Tribe) agree on its proper resolution. This conclusion is especially warranted in the context of a challenge to a boundary survey, because the QTA and APA

were enacted against the background of the established rule that third parties who claim no interest in the land may not bring an equitable action to challenge the Secretary's survey of lands while title remains in the United States, because the survey affects only the federal government's own internal administration of the land. *Lane* v. *Darlington,* 249 U.S. 331, 333-334 (1919); *Cragin* v. *Powell,* 128 U.S. 691, 698-700 (1888). For these reasons, relief is not available to petitioners under the APA's waiver of sovereign immunity in 5 U.S.C. 702 because the QTA is an "other statute that grants consent to suit" but "impliedly forbids" relief to a party who does not claim an interest in the property in which the United States also claims an interest.

As the Eleventh Circuit concluded in *Florida Dep't of Business Regulation* v. *United States Department of Interior*, 768 F.2d 1248 (1985), cert. denied, 475 U.S. 1011 (1986), it would be particularly inappropriate to allow a party who claims no interest in the land to challenge the Secretary's boundary determination and the nature of the United States' title where, as here, such a suit would be barred by an explicit exception in the QTA if it were brought by a party who did claim an interest in the land. In the *Florida* case, the State and several of its subdivisions sued the Secretary of the Interior under the APA challenging the Secretary's decision to take a certain parcel of land in trust for the Seminole Tribe under 25 U.S.C. 465. The plaintiffs did not assert any property interest in the land and did not seek to quiet title to the land in themselves (768 F.2d at 1254). Rather, they objected to the decision to take the land in trust because the Seminole Tribe used the trust land to sell tax-free cigarettes and operate bingo games. *Id.* at 1250-1251. In holding that the waiver of sovereign immunity in 5 U.S.C. 702 did not authorize the district court to grant relief because such relief is impliedly forbidden by the QTA, the Eleventh Circuit explained (768 F.2d at 1254-1255 (footnotes omitted)):

> Appellants quite forcefully contend that this is not a suit to quiet title, because they do not seek to have title to the land quieted in them, nor do they seek recognition of any property interest in the land. Although technically the suit in

> the instant case is not one to quiet title, we conclude that Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here. By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes. Here, the appellants seek an order divesting the United States of its title to land held for the benefit of an Indian tribe. That appellants do not assert an adverse claim of title to the land, however, does not lessen the interference with the trust relationship a divestiture would cause. Moreover, Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust. It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands. Hence we conclude that the APA waiver of immunity is inapplicable in this instance.

This reasoning applies equally here.[31]

II. THE UNITED STATES DID NOT WAIVE ITS IMMUNITY TO THIS SUIT IN DISTRICT COURT BY INTERVENING IN *ARIZONA* V. *CALIFORNIA* TO ESTABLISH THE EXISTENCE OF RESERVED WATER RIGHTS IN THE UNITED STATES FOR THE BENEFIT OF THE TRIBE

We have explained in point I that the APA's waiver of sovereign immunity does not authorize the district court to grant petitioners relief on the boundary issue in this case because Congress, in enacting the QTA and the McCarran Amendment, has forbidden the district court from granting that relief in a suit brought against the United States. Petitioners seek to avoid this statutory bar by arguing (Br. 18-24) that the United States waived its sovereign immunity to this suit in district court when it intervened in the original proceedings in this Court in *Arizona* v. *California.* This novel contention is

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[31] But see *City of Sault Ste. Marie* v. *Andrus*, 458 F. Supp. at 471-472.

without merit. When the Court in *Arizona* v. *California II* referred to this suit as a possible vehicle for the final determination of the boundary dispute, the Court acknowledged that the United States had moved to dismiss the complaint on the basis of sovereign immunity; and the Court contemplated that the sovereign immunity issue would be litigated in the ordinary course of trial and appellate proceedings. 460 U.S. at 638. The Court in no way suggested that the United States' immunity to this suit had *already* been waived, notwithstanding the existence of statutory provisions that retain the United States' immunity to suit and bar the district court from granting relief, by virtue of the United States' participation in *Arizona* v. *California*.

Moreover, petitioners candidly admit (Br. 19) that they have found no case to support their novel theory of waiver. This Court's decision in *United States* v. *The Thekla*, 266 U.S. 328, 339-340 (1924), and the lower court decisions cited by petitioners (Br. 19) all involved limited circumstances in which the United States may be susceptible to a counterclaim in the *same* suit, where that is deemed necessary to enable the court to resolve fairly a single overall controversy.[32] Nothing in those decisions or their rationale suggests that the United States' filing of or intervention in a suit in one court waives its immunity to a separate suit in a different court. As this Court recognized in *Block*, prior to enactment of the QTA, persons asserting title to land claimed by the United States could bring about a definitive

[32] See *United States* v. *Martin*, 267 F.2d 764 (10th Cir. 1959); *United States* v. *Taunah*, 730 F.2d 1360 (10th Cir. 1984). In *Jones* v. *Watts*, 142 F.2d 575 (5th Cir. 1944), the court held that although a party could assert a counterclaim against the United States in a suit brought by the United States, it could *not* seek the identical relief in a separate lawsuit. See *Fidelity & Casualty Co.* v. *Reserve Insurance Co.*, 596 F.2d 914, 916-918 (9th Cir. 1979).

Petitioners' citation (Br. 23) of *Minnesota* v. *United States*, 305 U.S. 382 (1939), also is inapposite. There, the Court held that when a case is removed from state court to federal court, the federal court does not have jurisdiction over the case if the state court lacked jurisdiction, even if the federal court would have had jurisdiction if the suit had been filed there in the first instance (*id.* at 388-389). This result has since been overruled by statute. Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 637, 28 U.S.C. (Supp. IV) 1441(e).

judicial resolution of the title dispute only by inducing the United States to file a quiet title action against them. See 461 U.S. at 280.[33] Hence, the United States had the prerogative to choose the judicial forum, if any, to which it would voluntarily submit the resolution of the dispute, subject of course to applicable statutory rules of jurisdiction and venue. Cf. *United States* v. *Shaw*, 309 U.S. 495 (1940); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-515 (1940). When the QTA was enacted, Congress necessarily retained that prerogative for the United States with respect to those disputes concerning title to real property for which the QTA did not waive the sovereign immunity of the United States.

In this case, the United States chose to submit the resolution of the dispute concerning its reserved water rights for the Fort Mojave Reservation and other federal establishments to this Court by intervening as a plaintiff in the original proceedings in *Arizona* v. *California* in 1953. 344 U.S. 919. The United States did not thereby waive its sovereign immunity to being named as a defendant in any suit in the district court to resolve disputed questions of title. Insofar as the instant case is concerned, that immunity from the district court's jurisdiction was preserved by Congress when it enacted the QTA in 1972, by virtue of the "Indian lands" and "water rights" exceptions in the QTA and the limitation on the granting of relief only to parties who themselves claim an interest in the disputed property. There is no suggestion in the QTA or elsewhere—such as in the statutes regulating this Court's original jurisdiction or authorizing the Attorney General and Solicitor General to conduct litigation on behalf of the United States in this Court (28 U.S.C. 518(a), 1251)—that Congress authorized officials of the Executive Branch to waive that statutorily prescribed immunity by participating in an original action in this Court.[34] See *Minnesota* v.

[33] The claimant also could petition Congress to enact a private bill granting relief or sue the United States for a money judgment on the theory that the United States had taken his interest in the property and therefore was obligated to pay just compensation. See *Block*, 461 U.S. at 280-281.

[34] Nor, of course, was the intervention and subsequent participation in *Arizona* v. *California* intended to have that consequence.

United States, 305 U.S. 382, 388-389 (1939) ("Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States."); see also *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. at 513-515. The absence of any indication of an affirmative congressional authorization is fatal, because, as the court of appeals recognized, waivers of sovereign immunity must be "unequivocally expressed" and must be "construed strictly and narrowly" (Pet. App. 7a). See *Block*, 461 U.S. at 287.[35]

This conclusion is reinforced by the differences in the nature of the two suits at issue here. Although the measure of the water

[35] For the same reasons, the statement by Deputy Solicitor General Claiborne during the oral argument before this Court in *Arizona* v. *California II*, quoted by petitioners (Br. 11, 1a), likewise could not operate as a waiver of the United States' sovereign immunity to this suit in the district court—even if we assume that the statement was intended and understood as a formal waiver of the arguments the United States had made in its motion to dismiss in the instant suit. In any event, the single statement upon which petitioners rely does not bear the weight they seek to give it.

The transcript of the oral argument indicates (at page 62) that in response to a question from the Bench regarding the pending motion to dismiss in the instant case, Mr. Claiborne stated: "I hope I do not have to—I disown the motion to dismiss which has been filed by the United States in the district court." At most, the statement reflected Mr. Claiborne's view at that time regarding the merits of the various arguments raised in the motion to dismiss; he did not suggest that the United States was formally abandoning those arguments, of which the sovereign immunity defense was only one. To the contrary, the very next sentence of his statement indicated that the district court would have to resolve those issues. See Tr. 62 ("Whether that—all of those defenses or some of them will prevail in that court is something—"). It also is possible that Mr. Claiborne misspoke, or that the third "I" in the first of Mr. Claiborne's statements quoted above was mistranscribed, since the sentence would make better grammatical sense without it and would have the opposite meaning. In any event, the Court apparently did not take the single ambiguous statement in Mr. Claiborne's colloquy with the Court as a formal concession that the district court could review the boundary issue under the APA, because the Court made no mention of the point in its opinion. The Court instead contemplated that the sovereign immunity question and other threshold issues would be resolved on the merits in the course of proceedings in the district court and court of appeals (460 U.S. at 638), as they now have been.

right reserved by the United States on behalf of the Tribe is determined in *Arizona* v. *California* by the number of practicably irrigable acres within the Reservation, the district court litigation initiated by the water-agency petitioners goes beyond establishing a basis for the quantification of water rights. In this suit, petitioners challenge the Secretary's statutory authority under 43 U.S.C. 772 to correct the boundary of the Fort Mojave Indian Reservation—and, as a consequence, to adjust the boundary between lands held in trust for the benefit of an Indian Tribe and other federal lands—as well as the procedures utilized by the Secretary for that purpose. The court of appeals therefore properly characterized this lawsuit as a challenge to "the Secretary's authority and procedures [to] establish[] Indian reservation boundaries" (Pet. App. 8a), and thereby to ascertain the trust status of land owned by the United States. Unlike *Arizona* v. *California*, it is not limited to the determination of *water* rights. And of course the district court could not enter a judgment that actually quantified the United States' reserved rights for the 3500-acre area; that is a subject governed by the decree in *Arizona* v. *California*.

Nor are they any compelling circumstances that would warrant recognition in this case of the novel waiver rule petitioners advocate. As we have explained above (see pages 15-17, *supra*), the Secretary's boundary determination cannot result in increased water rights for the Reservation unless the decree in *Arizona* v. *California* is amended, and the Court made clear in *Arizona* v. *California II* that petitioners must be afforded an opportunity to contest that determination before the decree will be amended. If the judgment of the court of appeals is affirmed, the United States will promptly consider what further steps it should take to bring about an expeditious and final resolution of the boundary issue.[36]

[36] One possibility would be for the parties to file a joint motion in *Arizona* v. *California* requesting the Court to resolve the boundary issue as part of a final resolution of the United States' claim of water rights for the Fort Mojave and other Reservations. Indeed, petitioners presumably could file such a motion on their own behalf, since the United States has already submitted its

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
EDWARD J. SHAWAKER
SARAH P. ROBINSON
Attorneys

AUGUST 1988

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water-right claims for the Fort Mojave Reservation to this Court for resolution in *Arizona* v. *California* and sovereign immunity therefore would not bar the Court from proceeding to a resolution of those claims for the 3500 acres at issue here on the motion of another party to that case.

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. The Administrative Procedure Act provides in relevant part (5 U.S.C. 702)):

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the courts to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. The Quiet Title Act, 28 U.S.C. (& Supp. IV) 2409a, provides in pertinent part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may

be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the

date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(*l*) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefore, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

3. The McCarran Amendment, Section 208 of the Act of July 10, 1952, ch. 651, 66 Stat. 560, as codified at 43 U.S.C. 666, provides:

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or

that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Services of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(b) Joinder in suits involving use of interstate streams by State

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

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OCTOBER TERM, 1987

THE STATE OF CALIFORNIA, THE STATE OF ARIZONA, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, and COACHELLA VALLEY WATER DISTRICT,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

FRED VENDIG, *General Counsel*
KAREN L. TACHIKI, *Deputy General Counsel*
JAMES F. ROBERTS, *Deputy General Counsel*
THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
P.O. Box 54153
Los Angeles, California 90054-0153

JEROME C. MUYS
Counsel of Record
THOMAS W. WILCOX
WILL & MUYS
1825 Eye Street, N.W., Suite 920
Washington, D.C. 20006
(202) 429-4344

Attorneys for The Metropolitan Water District of Southern California

September 15, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

JUSTIN MCCARTHY
REDWINE & SHERRILL
1950 Market Street
Riverside, California 92501

Attorney for Coachella Valley Water District

JOHN K. VAN DE KAMP, *Attorney General of the State of California*
R. H. CONNETT,
N. GREGORY TAYLOR,
Assistant Attorneys General
DOUGLAS B. NOBLE,
Deputy Attorney General
3580 Wilshire Boulevard, Suite 600
Los Angeles, California 90010

Attorneys for the State of California

ROBERT K. CORBIN, *Attorney General*
ANTHONY B. CHING, *Solicitor General*
1275 West Washington Street
Phoenix, Arizona 85007

Attorneys for the State of Arizona

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UNITED STATES OF AMERICA, *et al.*,

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REPLY BRIEF FOR THE PETITIONERS

I. Introduction

The respondents' briefs attempt to blur the subject matter for the sovereign immunity waivers provided by (1) the Quiet Title Act (28 U.S.C. §2409a ("QTA")) for land ownership disputes with the United States and (2) the Administrative Procedure Act (5 U.S.C. §702 ("APA" or "Section 702")) with respect to actions of federal officials for which an exclusive remedy has not already been provided by Congress. The United States' current analysis of the appropriate spheres of applicability of these two statutes contra-

dicts its *ante litem motam* analysis presented to this court in *Block v. North Dakota*, 461 U.S. 273 (1983), and to the District Court below. This reversal of field is unembarrassed by any plausible explanation whatsoever. In this reply the State Parties provide some practical examples as to why Congress intended the QTA to apply only to claims seeking to divest the United States of some or all of its ownership interests in land, while Section 702 authorizes review of agency management actions with respect to land admittedly owned by the United States, such as the boundary determinations involved here.

In addition, the United States dedicates a substantial portion of its brief to an argument not presented to or decided by the Court of Appeals, namely that the QTA's disclaimer of applicability to water rights claims constitutes an affirmative ban on any such actions other than pursuant to the McCarran Amendment of 1952 (43 U.S.C. §666). In the course of that argument the United States also attempts to expand upon this Court's dictum in *Dugan v. Rank*, 372 U.S. 609 (1963), as to the scope of the McCarran Amendment's sovereign immunity waiver. Consequently, the State Parties respond to those belated arguments.

Finally, the respondents make no persuasive arguments as to why the waiver of sovereign immunity with respect to the boundary components of the United States' *Winters* claims for the Indian reservations in *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I* ") should not be extended to the State Parties' District Court action.

II. Respondents Fail to Recognize the Distinction Between Suits Challenging (1) the United States' Underlying Ownership Interests in Disputed Lands and (2) the Actions of Federal Officials Regarding Land Admittedly Owned by the United States.

The State Parties contend that the proper analysis of the relationship of the QTA to Section 702 in federal land matters was presented to this Court by the United States in *Block v. North Dakota* as follows (S.P. Br. at 30):

> Of course, Section 702 allows challenges to the administration of federal lands on the ground that the actions complained of violate procedural or substantive restrictions imposed by applicable law. But the amendment to the APA was never conceived of as affording a vehicle for questioning the underlying title.

The State Parties' action does not "question" the United States' underlying title to the disputed lands, but only the Secretary's "administration" of those lands, *i.e.*, his erroneous interpretation of the 1870 executive order by which the President segregated certain public lands for administration as a military reserve (later as an Indian Reservation) from other lands that were to remain subject to the public land laws.

After the decision in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II* "), made it clear that the State Parties' District Court suit did not involve a challenge to the United States' "underlying title" to the disputed lands, the United States correctly applied the distinction it had recognized in *Block* and amended its motion to dismiss the State Parties' suit

by withdrawing its sovereign immunity defense to those claims which sought only a boundary determination, with the following explanation (S.P. Br. at 12):

> Where the action merely questions the accuracy of the determination of reservation boundaries, and the legal title to the lands is not at issue, we think the action may go forward pursuant to the Administrative Procedure Act.

The United States' brief here does not mention its position in *Block* and, with respect to its amended motion to dismiss, simply notes that after the decision in *Arizona II* (and also after *Block*) "the United States withdrew most of the objections that it had raised" before the District Court. U.S. Br. at 10. It asserts that its reversal of position was based on *Fadem v. United States*, 791 F.2d 1381 (9th Cir. 1986), and *Florida Dep't of Business Regulation v. United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), and "their elaboration upon the teachings of [*Block*] and *United States v. Mottaz*, 476 U.S. 834 (1986)." *Id.* at 11. The State Parties believe that the real motivation for the United States' switch of position was not that it had "seen the light", but rather that it had "felt the heat" from the stinging rebuke delivered to its handling of the Fort Mojave boundary issue by the District Court's decision invalidating the Secretary's Fort Mojave order. In any event, its initial *ante litem motam* analysis is the correct one and none of the four cases on which the United States relies support modification of that position.[1]

[1] The non-applicability of *Block, Mottaz and Florida* to the State Parties' action is dealt with in our initial brief. S.P. Br. at 30-31. *Fadem* involved an action brought by parties whose land title was clouded by a boundary resurvey. As such it was exactly the kind of title dispute to which Congress intended the QTA to apply (See S.P. Br. at 29) and was correctly decided. The State Parties dispute only its dictum that the QTA governs "*all* boundary disputes with the Government" (791 F.2d at 1383 (emphasis added)), which was obviously not carefully considered.

The line between the different kinds of federal land disputes to which the QTA and the APA apply can be traced back at least to the report of the Public Land Law Review Commission ("PLLRC") to Congress in 1970. The QTA was a direct outgrowth of a PLLRC recommendation that Congress waive sovereign immunity to permit parties to assert land *ownership* claims against the United States. S.P. Br. at 27-28. But the PLLRC also recommended that Congress waive sovereign immunity to permit challenges to public land *management* decisions by federal agencies in Recommendation 110, which provided that "[j]udicial review of public land adjudications should be expressly provided for by Congress." PLLRC Rept. at 256. The supporting text of this recommendation also noted the concurrent recommendations of the Administrative Conference of the United States for a broader general waiver of sovereign immunity by amendment of the APA. *Ibid.* While the latter proposal progressed through the Judiciary Committees of Congress to enactment in 1976, Recommendation 110 was considered by the Interior and Insular Affairs Committees and eventually also enacted in 1976 as section 1(a)(6) of the Federal Land Policy and Management Act ("FLPMA"), which declares it to be Congressional policy that "judicial review of public

land adjudication decisions be provided by law." 43 U.S.C. §1701(a)(6).

The distinction between "ownership" and "management" issues recognized by both the PLLRC and Congress would be obliterated by the Ninth Circuit's decision and the respondents' contentions. The United States argues that the QTA applies to *any* suit "*concerning* . . . the *nature* of the United States' title" to lands (U.S. Br. at 18 (emphasis added)) or "the *general* subject matter" of the QTA (*Id.* at 24 (emphasis added)), *i.e.*, federal lands. Similarly, the Tribes assert that the QTA "applies to a *broad range of claims* other than claims to title" and "was intended to govern *all* other disputes over the real property interests of the federal government [other than security interests and water rights]" (Tr. Br. at 37-38 (emphasis added)).

The respondents' expansive interpretation of the QTA would in essence amend Section 702 to preclude its applicability to most federal land management decisions. Thus, the APA would no longer apply to actions which have traditionally been brought under its provisions, both before and after the addition of the sovereign immunity waiver to Section 702 in 1976, to review decisions under the public land laws dealing with such matters as federal land exchanges,[2] rights-of-way across federal lands,[3] denials of public land patents under the Mining Law of 1872,[4] issuance of federal mineral leases on the Outer Continental Shelf

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[2] *National Coal Ass'n v. Hodel*, 825 F.2d 523 (D.C. Cir. 1987).

[3] *City and County of Denver v. Bergland*, 695 F.2d 465 (10th Cir. 1983).

[4] *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970).

or onshore,[5] sales of National Forest timber[6] and other similar "management" decisions granting, denying or adjusting statutory rights or privileges in the public lands. All such actions, to varying degrees, "concern" or "affect" the "nature" of the United States' title to federal lands, and some may even divest it of all or some of that interest, *e.g.*, if the United States is held obligated to issue a fee title patent under the Mining Law of 1872 or a lesser right-of-way interest under FLPMA. But none of those management disputes question the United States' underlying title to the lands prior to the management decision in dispute. Moreover, actions relating to Indian lands, which are also reviewable under the APA[7], would be wholly insulated from review, inasmuch as all such disputes affect what the United States describes as "the solemn obligations of the United States to the Indians" (U.S. Br. at 14) and "the solemn commitments made by the United States to the Fort Mojave Tribe in the 1890 Executive Order, *as now construed by the United States*". *Id.* at 34 (emphasis added). The State Parties emphasize that they do not seek to undermine any commitment the United States has made to the Tribes in creating their reservations, but simply to have a fair determination of the scope of that commitment pursuant to procedures consistent with traditional concepts of due process.

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[5] *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983).

[6] *West Virginia Div. of the Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975).

[7] *See, e.g., Southern Pacific Trans. Co. v. Watt*, 700 F.2d 550 (9th Cir.), *cert. denied* 464 U.S. 960 (1983).

Congress obviously did not intend the QTA to be the exclusive vehicle to review the myriad of federal agency land management actions applicable to the one third of the nation's land owned by the United States. As the United States recognizes (U.S. Br. at 23, n. 15), Congress knew the difference between a quiet title action and a suit for review of federal agency action. So did the Justice Department at that time, just as it did later in its arguments before this Court in *Block* (page 3 *supra*). Assistant Attorney General Ruckelshaus' testimony in 1970 opposing the Administrative Conference's proposed APA sovereign immunity waiver clearly distinguished Senator Church's then pending quiet title bill from that proposal:[8]

> In the Department of Justice the Lands Division has a recommendation, now in the Deputy's Office, to support in principle the Church bill. . . . The idea of sovereign immunity should not be raised as a defense by the Government in an action to quiet title, *to determine who owns land*. And I think that that is the kind of approach that we would favor in this area. What we are afraid of is that if you open up the *whole decisionmaking process* of the administrative branch to judicial review by the courts by removing the defense of sovereign immunity, we are likely to get a flood of cases in spite of what has been said.

The Section 702 waiver was to be the mechanism for review of agency management actions affecting

[8] *Hearing on S. 3658 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. 66 (1970) (emphasis added).

all federal lands, including Indian lands. The sometimes fine line between the applicability of the QTA and the APA in federal land cases can best be discerned by recognizing that the QTA only applies where a party claiming a present interest in certain lands asserts that claim against the United States and seeks a judgment that would divest or diminish the United States' claimed ownership interests. Where a plaintiff asserts no such interest, as here, and seeks only to invalidate an adverse federal management action, the QTA is obviously not applicable and Section 702 is the appropriate vehicle for judicial review.

The United States mistakenly equates the lack of a remedy under the QTA as an implied denial of any other remedy. But, as this Court explained in *Block*, Section 702 of the APA is only inapplicable "when Congress has dealt in *particularity* with a claim and [has] intended a specified remedy to be the exclusive remedy". 461 U.S. at 286, n. 22 (emphasis added). That is plainly not this case. Clearly, if Congress has not provided a remedy in the QTA for the State Parties' unique boundary claim, nothing in that Act "expressly or impliedly forbids the relief which is sought" so as to preclude the applicability of Section 702. The proper analysis was applied in *City of Sault Ste. Marie, Mich. v. Andrus*, 458 F.Supp. 465 (D.D.C. 1978). In that case the City challenged the Secretary of the Interior's acceptance of certain Indian owned lands in trust, the result of which was to deprive the City of taxing power over such lands. The court recognized that the City was asserting a jurisdictional, not a title interest and rejected the United States' argument as to the preclusive effect of the QTA's Indian lands exemption (*id.* at 471-72):

Since plaintiffs do not possess the type of property right which would be necessary for the maintenance of a quiet title action, it is clear that 28 U.S.C. §2409a is inapplicable to this suit, and may not, therefore, force dismissal of this suit due to the doctrine of sovereign immunity.

III. If the QTA is Applicable to the District Court Action, the Facts of this Case Require Application of the *Spaeth* Rule.

Respondents contend that the Eighth Circuit's decision in *Spaeth v. United States Secretary of the Interior*, 757 F.2d 937, *reh'g and reh'g en banc denied* (1985), that the United States must demonstrate a "substantial possibility" that disputed lands are "Indian trust lands" in order to invoke the QTA's exemption for such lands was based on the "unusual facts" of that case which are not present here. U.S. Br. at 39-40; Tr. Br. at 42-43. However, both cases involved a cloud on the title of the plaintiffs' property—the Spaeths' land, which they had owned for 30 years and which the Secretary had formally advised them (as a result of a changed Solicitor's opinion) was very likely actually Indian lands, and Metropolitan's water rights under its water delivery contract with the Secretary, which it has held for over 50 years and which are threatened with substantial reduction because of the Secretary's changed boundary interpretation. Both the Spaeths' land interests and Metropolitan's water rights were put in jeopardy by a "sudden and sharp change in the prior understanding of the governing legal principles upon which [they] had relied". U.S. Br. at 39. The equities

in the present case are at least as compelling as those in *Spaeth*.

IV. The QTA Does Not Expressly or Impliedly Forbid Suits Relating to Water Rights.

The QTA expressly provides that it does not apply where the only real property interest claimed by the United States is "a security interest or water rights . . . nor does it apply to or affect actions which may be or could have been brought under section 208 of the Act of July 10, 1952" (the McCarran Amendment). The United States made no argument before the Ninth Circuit that this language is anything other than what it plainly purports to be on its face, namely a disclaimer to make it clear that the QTA does not apply to actions relating to water rights. Consequently, the Ninth Circuit had no occasion to address the United States' novel and belated argument that the disclaimer actually has an affirmative "preclusive effect" that "expressly forbids" suits relating to water rights. U.S. Br. at 13, 26.

This interpretation has no basis in the statute or its legislative history. The Justice Department proposed the language to make it clear that the "real property" interests to which the proposed QTA would apply were lands, not water rights, which are also a species of real property. It explained that actions "involving [or] relating to water rights. . . . are provided for in other provisions of the code", citing the McCarran Amendment (S. Rep. No. 92-575, 92d Cong., 1st Sess. 6 (1971)), and that it did not wish "to disturb existing law" (U.S. Br. at 29). Its only stated purpose was to preserve existing law governing suits against the United States under the McCarran Amendment, whatever its scope might be. The

Justice Department did not represent to Congress that its proposed language would accomplish a statutory ban on all suits "involving or relating to water rights" other than those authorized by the McCarran Amendment, and Congress did not intend the disclaimer to have that distorted, hidden meaning. The relevant issue is whether the McCarran Amendment precludes the applicability of the Section 702 waiver of sovereign immunity to the State Parties' suit, to which we now turn.

V. The McCarran Amendment does not Expressly or Impliedly Forbid the District Court Action.

As we noted in our initial brief (S.P. Br. at 26-27), the State Parties' suit is a unique, hybrid action necessitated because of (1) the special importance of an Indian reservation boundary under the measure of *Winters* water rights announced for Fort Mojave and the other Indian reservations in *Arizona I*, *i.e.*, practicably irrigable acreage, and (2) this Court's decision not to adjudicate the disputed boundary issues in *Arizona II*. Although a determination of the boundary will have an impact on the Tribes' putative *Winters* rights, it is not a "general stream adjudication" which this Court stated in *Dugan v. Rank*, 372 U.S. 609 (1963), is the limit of the McCarran Amendment's waiver of sovereign immunity.

The United States argues, again for the first time in this dispute, that the McCarran Amendment was intended to be the exclusive means for *any* action to "adjudicate" water rights. The United States relies solely on an Administrative Conference memorandum submitted to the Senate Judiciary Committee in 1970 which stated that "[s]pecial statutory remedies . . . such as those dealing with . . . *water rights*, and the

like retain the same preclusive effect on other remedies *that they have now*." U.S. Br. at 28 (emphasis added). But the second emphasized phrase makes it clear that the intent was simply to preserve the status quo. The same is true of the statement of then Assistant Attorney General Scalia cited by the United States (U.S. Br. at 22), which obviously was not intended to prejudge the scope of any particular existing remedies. Conceding that Congress should be presumed to have been aware of this Court's decision in *Dugan*, it was also therefore aware that the Court applied its then recently announced test for an officer's suit (*Malone v. Bowdoin*, 369 U.S. 643 (1962)) even though it found the McCarran Amendment inapplicable. It did *not* hold that the McCarran Amendment was the exclusive vehicle for a suit challenging federal agency actions which may "relate" to or "affect" water rights, but which does not seek an adjudication of specific federal water rights. Indeed, even before the 1976 APA amendment federal agency actions adversely affecting water rights could be challenged by an officer's suit, a fact stressed by the Justice Department in the hearings on the McCarran Amendment in urging that the proposed legislation was unnecessary.[9] Since this Court has not viewed the McCarran Amendment as precluding officer's suits relating to water rights issues, neither does it preclude review under Section 702, contrary to the conclusion in *Block* as to the preemptive effect of the QTA in quiet title adjudications. That is the express

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[9] *Hearings on S. 18 Before a Subcommittee of the Senate Judiciary Committee*, 82d Cong., 1st Sess. 19-20 (1951).

holding in *South Delta Water Agency v. United-States.*[10]

Contrary to the United States' assertions, the State Parties do not "seek to divest the United States of its legal title to (and the Tribe of its equitable interest in) all reserved water rights for the 3500-acre [disputed] tract [adjacent to the Fort Mojave Reservation]." U.S. Br. at 15. The United States presently has no reserved water rights for those disputed lands, even though the Secretary is permitting the Tribe to allow a third party to use water on those lands in violation of the decree in *Arizona I*, as the Tribes concede. Tr. Br. at 6. Its efforts to have this Court make such an allocation were rejected in *Arizona II*. All that the State Parties seek is review of a boundary determination which the United States asserted as the basis for its *Winters* claim for the disputed lands rejected in *Arizona II*. As a result of this Court's decision of the scope of the *Winters* right for the Fort Mojave Reservation in *Arizona I*, the boundary determination obviously has water rights implications, but a review of its legality is not a water rights "adjudication" of the kind covered by the

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[10] 767 F.2d 531, 542 (9th Cir. 1985). See also *Joint Board of Control of the Flathead, Mission and Jocko Irr. Dists. v. United States*, 832 F.2d 1127 (9th Cir. 1987), *cert denied* 56 U.S.L.W. 6789 (U.S. May 17, 1988) and *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 763 F.2d 1032 (9th Cir. 1985). The United States' attempt to distinguish these cases from the State Parties' suit (U.S. Br. at 30) is not persuasive. Like *Dugan*, they involved challenges to agency action adversely affecting water rights, but not seeking a general adjudication. However, whereas *Dugan* found that the *Malone v. Bowdoin* elements necessary for an officer's suit were not present, the Ninth Circuit decisions found Section 702 applicable.

McCarran Amendment. Indeed, the United States concedes that the State Parties "do not request the district court actually to adjudicate *any* party's water rights as such". U.S. Br. at 27.

Moreover, even if the McCarran Amendment were the only available avenue for the relief sought by the State Parties, we believe that the District Court action is not incompatible with its consent provisions. First, in *United States v. District Court for Eagle County*, 401 U.S. 520 (1971), this Court stated that the *Dugan* interpretation of the scope of that Act should not be applied in an "extremely technical" fashion. *Id.* at 525. Second, all other rights on the Lower Colorado River, other than these three remaining Indian reservation claims, have already been adjudicated in *Arizona I and II*. Consequently, like the Colorado supplemental proceedings in *Eagle County*, there is no need for any other parties other than those who are here. The District Court action is as "comprehensive" as is appropriate.

Prior to the McCarran Act, all water rights litigation on western stream systems was "piecemeal" unless the United States decided either to intervene or initiate its own action to permit the adjudication of federal rights. The McCarran Amendment was designed to end that inequitable situation. But the United States would turn the sword which Congress gave the states to facilitate water rights adjudications into a shield to prevent the resolution of the three remaining unquantified federal water rights on the Lower Colorado River. Permitting the State Parties to take the first step necessary to finally conclude the comprehensive adjudication of Lower Colorado River Basin water rights initiated over 35 years ago

in *Arizona v. California* is fully consistent with the purpose of the McCarran Amendment.

VI. The Respondents Offer No Valid Reasons why the United States' Waiver of Sovereign Immunity in *Arizona v. California* Should not Extend to the District Court Action.

In our initial brief the State Parties invited the respondents to identify any public interest that would be endangered by applying the principle in *Luckenbach S.S. Co. v. The Thekla*, 266 U.S. 328 (1924), to extend the waiver of sovereign immunity resulting from the United States' claims in intervention in *Arizona I* to the District Court action to adjudicate the boundary components of those claims. S.P. Br. at 20. The United States' several arguments stressing lack of express statutory authority for our proposal are irrelevant to the question of whether the *judicially* created *Thekla* rule should be extended. The United States does argue that it did not intend such a result when it intervened in *Arizona I*. U.S. Br. at 47, n. 34. To that we respond as Justice Holmes did in *The Thekla*: "[The Government] joined in the suit, and that carried with it the acceptance of whatever liability the *courts* may decide to be *reasonably incident to that act*". 266 U.S. at 341 (emphasis added). Arizona did not expect, when it sued California in 1952, that the United States would intervene and assert sweeping *Winters* claims based on all the practicably irrigable acreage on all the Indian reservations in the Lower Colorado River Basin, which is the unprecedented legal principle which has made the proper location of reservation boundaries so critical. For the United States to drop that bombshell on the State Parties in *Arizona I* and then actively frustrate the

State Parties' efforts over the past ten years to resolve the disputed boundary issues is unconscionable.

The Tribes argue that the State Parties' proposal "could open the door for virtually unlimited waivers of the United States sovereign immunity in the federal courts whenever the Government has invoked the original jurisdiction of this Court." Tr. Br. at 24. However, it is highly unlikely that the expanded *Thekla* rule would be invoked very often, inasmuch as when the United States initiates or intervenes in a suit all issues are almost always finally resolved in that proceeding. The State Parties would hope that the present example of deplorable litigation conduct on the part of the United States is relatively rare. Moreover, the applicability of the rule could readily be limited by appropriate conditions. As we indicated in our initial brief (S.P. Br. at 19-20), it would only apply to the extent a party, as here, was not seeking affirmative relief beyond that presented by the initial waiver. Other limitations could be structured, such as limiting it to suits brought by parties to the original action which triggered the waiver, as in the instant case.

Finally, the professed concern of the Tribes (Tr. Br. at 25) and the United States (U.S. Br. at 31) that the State Parties' position would foster undesirable "piecemeal" litigation of federal water rights is belied by their track record over the past 15 years with regard to the Indian boundary disputes at issue here. For the same reason, the State Parties find astoundingly incredible and place no credence in the United States' assertion that it "has no interest in delaying a final resolution of the boundaries of the three Reservations" (U.S. Br. at 16) and that "[i]f the judg-

ment of the court of appeals is affirmed, the United States will promptly consider what further steps it should take to bring about an expeditious and final resolution of the boundary issue". *Id.* at 49.

VII. There is a Present, Imperative Need to Resolve the Boundary Disputes.

The United States contends that there are no "compelling circumstances" justifying permitting the District Court action to go forward (U.S. Br. at 49) and that affirmance of the Ninth Circuit "would not have a substantially adverse effect" on the State Parties. *Id.* at 15. This is nonsense, and is simply a modified version of the standing arguments that the United States belatedly raised before the Ninth Circuit. See S.P. Br. at 12, 13, 47-49. Similarly, the Tribes assert that "the unresolved status of the boundaries imposes no burden on Metropolitan, which, as Special Master Tuttle noted, has not even bothered to address the possibility of increased awards of water to the Tribes." Tr. Br. at 43, n. 34. This is also false. Metropolitan faces an imminent curtailment of its Colorado River supply in the near future. S.P. Br. at 8. It has been engaged for a number of years in efforts to replace that lost supply, including a variety of arrangements with other Colorado River users in California. It has proposed legislation that would authorize the lining of the All American Canal in California to conserve as much as 100,000 acre-feet of water annually, most of which would become available to Metropolitan. See H. Rept. No. 100-780, 100th Cong., 2d Sess. 20-28 (1988). Similarly, Metropolitan has been in negotiations with Imperial Irrigation District to finance the improvement of Imperial's distribution system to conserve presently wasted water

which would be made available to Metropolitan. In a recent decision the California Water Resources Control Board required Imperial to initiate additional conservation efforts on its system and noted that Metropolitan had a substantial present need for the conserved water:[11]

> "As the result of wet conditions on the Colorado River since 1983, MWD has been able to divert close to the 1.3 million acre-foot capacity of its Colorado River aqueduct in each of the last five years. . . . Due to the development of the Central Arizona Project and other factors, however, the quantity of Colorado River water available for diversion by MWD on a dependable basis will be restricted to the quantity available under its fourth priority right of 550,000 acre-feet per annum. This quantity is reduced further by approximately 30,000 acre-feet per annum due to current levels of use by other holders of present perfected rights. There is a possibility of additional reductions in the quantity of water available to MWD due to increased use by Indian tribes. . . . The Central Arizona Project began deliveries in 1985 and is expected to utilize its full apportionment in about 1992. . . . Without the development of additional supplies, the record indicates that MWD faces a potential system-wide shortfall during dry periods of 560,000 acre-feet per annum by the year 2000, in-

[11] *In the Matter of Waste and Unreasonable Use of Water By Imperial Irrigation District* (September 7, 1988) at 10. (Record citations omitted).

creasing to 980,000 acre-feet per annum by 2010."

Respectfully submitted,

FRED VENDIG, General Counsel
KAREN L. TACHIKI, Deputy General Counsel
JAMES F. ROBERTS, Deputy General Counsel
The Metropolitan Water District of Southern California
P.O. Box 54153
Los Angeles, California 90054-0153

JEROME C. MUYS
Counsel of Record
THOMAS W. WILCOX
WILL & MUYS
1825 Eye Street, N.W., Suite 920
Washington, D.C. 20006
(202) 429-4344

Attorneys for The Metropolitan Water District of Southern California

JUSTIN McCARTHY, Esq.
REDWINE & SHERRILL
1950 Market Street
Riverside, California 92501
(714) 684-2520

Attorney for Coachella Valley Water District

JOHN K. VAN DE KAMP, Attorney General of the State of California
R. H. CONNETT,

N. GREGORY TAYLOR,
Assistant Attorneys General
DOUGLAS B. NOBLE,
Deputy Attorney General
3580 Wilshire Boulevard, Suite 600
Los Angeles, California 90010

Attorneys for the State of California

ROBERT K. CORBIN, Attorney General
ANTHONY B. CHING, Solicitor General
1275 West Washington Street
Phoenix, Arizona 85007

Attorneys for the State of Arizona

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

UNITED STATES, et al.,
Respondents.

On Writ of Certiorari
To The United States
Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE KLAMATH TRIBE; THE NEZ PERCE TRIBE; THE SWINOMISH TRIBAL COMMUNITY; ET AL. (additional amici listed on inside cover) IN SUPPORT OF RESPONDENTS

Richard Dauphinais
Counsel of Record

Melody L. McCoy
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Amici Curiae

August, 1988

Jicarilla Apache Tribe;
Pueblo of Laguna;
Pueblo of Santa Ana;
Pyramid Lake Paiute Tribe Of Indians;
Rosebud Sioux Tribe;
Sac & Fox Tribe of Indians of Oklahoma;
and
Southern Ute Indian Tribe

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**BRIEF AMICUS CURIAE OF
THE KLAMATH TRIBE;
THE NEZ PERCE TRIBE;
SWINOMISH TRIBAL COMMUNITY; ET AL.
IN SUPPORT OF RESPONDENTS**

INTEREST OF THE AMICI CURIAE

Amici curiae are ten (10) federally recognized Indian tribes.[1/] Amici have

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[1/] Counsel for petitioners and counsel for respondents have consented to the filing of the brief of amici in support of respondents. The consents are submitted herewith.

a substantial interest in the issues raised in this case. The issues involve the scope of the Indian lands exception to the Quiet Title Act, 28 U.S.C. §2409a, and the extent of a waiver of federal sovereign immunity when the United States asserts water rights claims on behalf of Indian tribes. One amici tribe is involved in a dispute over title to its lands. Other amici tribes anticipate quantification of their water rights in proceedings in which the United States is involved. All amici are concerned that, because of the extensive federal control over Indian lands and resources, limited relief in federal courts against the United States must be preserved. Amici are convinced that the United States' ability to protect Indian property from interference by third parties will be severely undermined by the availability of judicial relief.

SUMMARY OF ARGUMENT

The Indian lands exception to the Quiet Title Act (QTA) retains immunity in suits seeking to divest the United States of title to Indian trust lands. The Court of Appeals' construction of the QTA should be affirmed because it is consistent with established congressional policy and decisions of this Court protecting tribal land holdings. Interference by third parties has been particularly disfavored by Congress and the Court.

The decision below is also consistent with the basic policy behind sovereign immunity: that governments should not be in court unless and until their legislative branches consent to suit. Moreover, a broad interpretation of waivers of federal sovereign immunity would essentially discourage performance by the federal trustee of its duty to

represent Indian tribes in critical water rights matters. Finally, judicial review in separate actions of issues raised in water rights adjudications would lead to uncertainty and delay in the quantification of important treaty water rights. This would adversely affect judicial resources as well as the natural and financial resources of all parties. Congress and this Court have repeatedly disapproved of piecemeal adjudication of water rights.

ARGUMENT

I. THE QUIET TITLE ACT PROHIBITS THIRD PARTY SUITS WHICH SEEK TO DIVEST THE UNITED STATES OF TITLE TO INDIAN LANDS.

A. The Indian Lands Exception Applies.

The Quiet Title Act, 28 U.S.C. §2409a (QTA), generally waives the United States' sovereign immunity in actions involving the United States' title to real property. 28 U.S.C. §2409a(a).

However, the QTA expressly excepts actions seeking to divest the United States of title to Indian lands. Id. Because Petitioners' suit seeks to divest the United States of title to Indian lands, the QTA's Indian lands exception applies and sovereign immunity bars the suit.[2/]

The Court of Appeals correctly found that Congress intended to insulate Indian lands from challenges such as that posed by Petitioners' suit. The fact that Petitioners neither claim an interest in the land, nor seek to recover title in their own names is irrelevant. Pet. Br.

2/This Court has twice held that the QTA is the exclusive means by which the United States' title to real property can be challenged. United States v. Mottaz, 476 U.S. 834 (1986); Block v. North Dakota, 461 U.S. 273 (1983). And, since the QTA forbids the suit, the APA, by its own terms, does as well. 5 U.S.C. §702; see Block v. North Dakota, 461 U.S. at 286 n.22. Therefore, Petitioners' action, brought under the APA, cannot lie.

at 25-36. The relief Petitioners seek (a judicial declaration that the lands are no longer held in trust for the Tribes) would in fact divest the United States of title to Indian lands. That is the test for whether the Indian lands exception applies; not whether the challenger would in fact obtain the land. Nothing in the QTA or legislative history indicates otherwise. See United States v. Mottaz, 476 U.S. at 842 (description of claim and relief sought bring suit within the scope of the QTA).

Moreover, before the QTA, sovereign immunity barred all suits challenging federal land holdings. Minnesota v. United States, 305 U.S. 382 (1939). The QTA generally waived immunity in land title dispute suits, but expressly retained it where title to Indian lands

is involved.[3/] Since the Indian lands exception prohibits direct challenges by third parties claiming an interest in the land, a fortiori it prohibits challenges by those with any interest less than the land itself, i.e., Petitioner Metropolitan Water District's contract rights, or potentially affected water users. See State of Florida, Dept. of Business Regulation v. United States Dept. of the Interior, 768 F.2d 1248, 1254-55 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986).

3/This Court has noted that the Indian lands exception is "necessary to prevent abridgment of 'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands." United States v. Mottaz, 476 U.S. at 843 n.6, quoting letter from Solicitor of the Department of the Interior to Chairman, Committee on Interior and Insular Affairs, appended to House Rep. No. 92-1559, reprinted in 1972 U.S. Code Cong. & Admin. News 3, 92d Cong. 2d Sess. at 4547, 4556-57.

In addition, as in this case, tribal lands often border on other federal lands. Given the amount of land held in trust for tribes, and the number of water users affected by tribal water rights (see infra Parts II and III of this Brief), if this suit is permitted, third parties could devastate Indian land holdings. Therefore, this Court should affirm the decision below that Petitioners' action is within the meaning of suits prohibited by the Indian lands exception to the QTA.

B. A "Substantial Possibility" Test Is Not Required.

Petitioners argue that if the QTA applies, the United States should be required to prove that there is at least a "substantial possibility" that the disputed lands are trust or restricted Indian lands. Pet. Br. at 36-43. However, nothing in the QTA or its

legislative history supports that notion. This Court has held that "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." United States v. Mottaz, 476 U.S. at 843 (footnote omitted; emphasis added).[4/]

In addition, the respondent Tribes have aptly pointed out the fallacy in Petitioners' argument. Tr. Opp. Br. at 16-17. The substantial possibility test would permit a court to exercise jurisdiction over the merits of the United States' claim; thereby rendering

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4/Amici maintain that the QTA is unambiguous, and that it should be accorded its plain meaning. However, if there is any doubt about the meaning of the statute, it should be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

the Indian lands exception meaningless.[5/] See F. Cohen, Handbook of Federal Indian Law 322 n.335 (1982 ed.), and Wilson v. Omaha Indian Tribe, 442 U.S. 653, 668-669 (1979) (rejecting argument that proof of prior possession or Indian title is a precondition to application of the burden of proof statute, 25 U.S.C. §194, and holding that where a tribe makes out a prima facie case of prior possession or title to a disputed area, §194 is triggered.)[6/]

Finally, Petitioners' argument as to the "mischief" that will result in the absence of a substantial possibility test

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5/For these reasons, as the Tribes and United States point out, Spaeth v. United States Secretary of the Interior, 757 F.2d 937 (8th Cir. 1985), is either incorrect or limited to its unique facts.

6/Alternatively, should this Court find that the substantial possibility test does apply, that test has been met in this case. U.S. Opp. Br. at 16.

is superficial and misleading. Pet. Br. at 41. The United States rarely simply "redraws boundaries," as Petitioners suggest. Moreover, if an adverse claimant is actually in possession of the property, the United States would sue for ejectment, thereby permitting third parties a "day in court" on the merits of their ownership claim. See, e.g., Jones v. United States, 195 F.2d 707 (9th Cir. 1952). Adverse claimants may also be protected by water rights adjudications in which title issues may be litigated, e.g., In Re General Adjudication of All Rights To Use Water In The Big Horn River System, 750 P.2d 681 (Wyo. 1988), and they may have remedies under the Tucker Act, 28 U.S.C. §1346(a)(2). United States v. Mottaz, 476 U.S. at 847; Fadem v. United States, 791 F.2d 1381 (9th Cir. 1986). To the extent third parties have environmental concerns, they may sue

under environmental laws even if Indian interests are involved. E.g., Cady v. Morton, 527 F.2d 786 (9th Cir. 1975). Finally, Congress may validate non-Indian claims to tribal lands. E.g., Pueblo Lands Act of 1924, ch. 331, §4, 43 Stat. 636, 637.

This Court's reasoning in Mottaz that the United States need only claim an interest in the land for the Indian lands exception to apply is fully applicable here. Alternatively, the Court should adopt the ruling of the Court of Appeals that a "colorable claim" by the United States is sufficient.

II. ASSUMING ARGUENDO THE QUIET TITLE ACT DOES NOT BAR THIS ACTION, BROAD JUDICIAL REVIEW OF THIRD PARTY SUITS WOULD VIOLATE THE HISTORICAL FEDERAL OBLIGATION TO PROTECT INDIAN LANDS.

This Court has noted the necessity of the Indian lands exception: to prevent abridgment of "solemn obligations" and "specific commitments" that the federal

government made to Indians regarding their lands. United States v. Mottaz, 476 U.S. at 843 n.6. Indeed, the protection of Indian land holdings is central to the federal government's trust obligation to Indians. Heckman v. United States, 224 U.S. 413 (1912).[7/] Examples of early attempts by this Court and Congress to establish a foundation for the recognition and protection of Indian property interests are found in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), in which the Court held that the United States has the exclusive right to purchase or extinguish Indian title, and the Non-Intercourse Act, 25 U.S.C. §177, which prohibits Indian land transactions except as authorized by

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7/ The United States holds about 44 million acres of land in trust for Indian tribes. Bureau of Indian Affairs, U.S. Dep't of the Interior, Annual Report on Indian Lands (1985).

Congress. Two hundred years later, the federal government still controls Indian property, most notably by treaties in which the United States contractually undertook to protect lands in Indian ownership.

Notwithstanding a period of harmful and since repudiated policies (e.g., allotment, homesteading, and sale of surplus lands without tribal consent), Congress has repeatedly pledged to protect Indian property. The congressional policy has been manifested in a number of ways. Most importantly, there are general and specific statutory restraints on alienation of and trespass on tribal lands.[8/] Congress has consistently exempted tribal lands from

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8/E.g., 25 U.S.C. §177; 25 U.S.C. §§476-477; Act of June 7, 1924, ch. 331, §17, 43 Stat. 636, 641 (Pueblos); Act of Feb. 28, 1809, ch. 23, 2 Stat. 527 (Alabamas and Wyandotts).

general legislation that opened the public domain to settlement,[9/] or that provided land grants to railroads.[10/] Congress also affirmed the immunity of Indian lands from state taxation and jurisdiction in the enabling acts of many western states,[11/] and has enacted protections against or refused to consent to condemnation of tribal lands by states.[12/]

9/E.g., Act of Mar. 2, 1907, ch. 2535, 34 Stat. 1229.

10/E.g., Act of Sept. 1, 1888, ch. 936, §15, 25 Stat. 452, 457 (Shoshones and Bannocks); Act of Oct. 1, 1890, ch. 1277, §5, 26 Stat. 663, 664 (Siletz Confederated Tribes); Act of Mar. 3, 1887, ch. 366, §5, 24 Stat. 545, 546 (Crows).

11/Act of June 20, 1910, ch. 310, §§2, 20, 36 Stat. 557, 558-559, 569 (N.M. and Ariz.); Act of June 16, 1906, ch. 3335, §1, 34 Stat. 267-268 (Okla.); Act of July 16, 1894, ch. 138, §3, 28 Stat. 107 (Utah); Act of Feb. 22, 1889, ch. 180, §4, 25 Stat. 676, 677 (N.D., S.D., Mont., Wash.).

12/See F. Cohen, supra at 521 & 523 n.104-105.

The longstanding congressional policy has been supplemented by judicial protection. Thus, executive action authorizing the alienation of tribal lands is ineffective absent congressional authorization. United States ex. rel. Hualapi Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941); Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct.Cl. 1974). Congressional authorization to alienate or interfere with Indian land must be express, not implied. Santa Fe, 314 U.S. at 353-354; United States v. Minnesota, 270 U.S. 181 (1926); Spalding v. Chandler, 160 U.S. 394 (1896). Judicial review of congressional action is appropriate, and Congress must compensate tribes for the abrogation of recognized title. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). The United States and tribes may sue for ejectment,

trespass, or possession where Indian lands are involved. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (Oneida I); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Marsh v. Brooks, 49 U.S. (8 How.) 223 (1850), rev'd 55 U.S. (14 How.) 513 (1852); see also Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1856). Officer suits cannot be used to circumvent the restrictions of the QTA, in part because "the Indian lands exception to the QTA would be rendered nugatory." Block v. North Dakota, 461 U.S. at 285. Most recently, this Court found liability for wrongful possession of Indian lands conveyed in 1795 without federal consent. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (Oneida II). The cases well-illustrate the sanctity of Indian lands that is threatened by this action.

Federal law has particularly protected tribal possessory rights against interference by third parties. The early Trade and Intercourse Acts sought to restrain and punish various types of trespass on Indian lands.[13/] Current federal statutes provide criminal penalties for unauthorized hunting, trapping, or fishing on Indian land, and provide a restitutionary remedy against non-Indian trespassers who injure or destroy property on Indian lands. 18 U.S.C. §1165, §1160. Federal statutes also forbid the grazing of livestock on Indian lands without tribal consent and preclude unauthorized persons from settling on Indian lands. 25 U.S.C. §§179-180.

13/ E.g., Act of May 19, 1796, ch. 30, §4, 1 Stat. 469, 470; Act of Mar. 1, 1793, ch. 19, §4, 1 Stat. 329; Act of July 22, 1790, ch. 33, §5, 1 Stat. 137, 138.

Federal law also allocates the burden of proof in certain land title disputes. Under 25 U.S.C. §194, the ultimate burden of persuasion in land claim cases involving an Indian is allocated to the non-Indian claimant once the Indian has shown previous possession or ownership. This statute has been held applicable to tribal land claims, to suits instituted by the United States as trustee for tribal lands, and to individual Indian land claims. Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); United States v. Sands, 94 F.2d 156 (10th Cir. 1938); Felix v. Patrick, 36 F. 457 (C.C. Neb. 1888), aff'd, 145 U.S. 317 (1892). State law defenses of adverse possession, statutes of limitation, and abatement generally are unavailable against Indians in land claims litigation. Oneida II, 470 U.S. at 240-246. Nor can Indian possessory rights generally be defeated

by tribal inaction or by tribal efforts to convey property interests in a manner inconsistent with the federal laws restraining alienation. Schaghticoke Tribe v. Kent School Corp., Inc., 423 F.Supp. 780 (D.Conn. 1976); Narrangansett Tribe v. Southern R.I. Land Dev. Corp., 418 F.Supp. 798 (D. R.I. 1976); see also Oneida I, 414 U.S. 661. Finally, the federal government has long recognized that Indian tribes have broad inherent civil jurisdiction over their lands, including authority to exclude nonmembers. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Williams v. Lee, 358 U.S. 217 (1959).

Thus, protection of Indian lands, especially against interference by third parties, has been a cornerstone of federal Indian policy. The goal has been to insulate Indian lands from the full impact of market forces, and to preserve

a land and resource base for the furtherance of Indian values. But because of the extensive federal control over Indian affairs, limited relief in federal courts against the United States where Indian lands are involved is essential. If broad judicial relief is permitted, third parties will eventually erode Indian land ownership without tribal consent, thereby interfering with tribal culture, society, and self-government.

III. WHEN THE UNITED STATES WAIVES ITS SOVEREIGN IMMUNITY TO ASSERT A CLAIM FOR INDIAN WATER RIGHTS, THE WAIVER DOES NOT EXTEND TO "ANCILLARY PROCEEDINGS."

A. The Court of Appeals Correctly Held That Any Waiver of Immunity By The United States In Arizona v. California Does Not Extend To This Separate Action.

Generally, a waiver of sovereign immunity must be express. Block v. North Dakota, 461 U.S. at 280. Waivers are to

be strictly construed. Id. at 287. Waiver is premised upon congressional consent, not judicial fiat or public policy reasons. This Court has often affirmed the basic policy behind sovereign immunity: that governments should not be in court unless and until their legislative branches consent to suit. Block v. North Dakota; United States v. Sherwood, 312 U.S. 584 (1941).[14/] As discussed above, Congress has retained immunity in suits seeking to divest the United States of title to Indian lands. As Petitioners admit, there is neither law nor evidence

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14/For this reason, Petitioners' arguments that this Court's statements in Arizona v. California, 460 U.S. 605 (1983), "waived" the United States' immunity in this action, and that "there are no public policy reasons which support limiting the waiver to the original forum selected by the United States," are inapposite. Pet. Br. at 16 & 18-24.

of congressional intent which would subject the United States to suit in a separate action merely by virtue of its involvement in Arizona v. California. Pet. Br. at 18-19. Therefore, the Court of Appeals correctly recognized that the United States is immune from Petitioners' action unless and until Congress decides to waive that immunity.

Even assuming arguendo that this Court could waive immunity, it should not. "Back-door" suits such as Petitioners' directly contradict settled congressional and judicial policy to insulate Indian property from such challenges. See supra Part II of this Brief. Moreover, there are presently over 60 pending water rights cases in which Indian rights are being adjudicated. Bureau of Indian Affairs, U.S. Dep't of the Interior Budget Justifications, F.Y. 1989, 165

(1988).[15/] Most of the adjudications impact more than one tribe. The tribes and the United States should not be forced to defend in separate actions perhaps a multitude of boundary and title issues (or the general authority of the United States over Indian affairs) merely because they are seeking to have their water rights adjudicated.

In addition, a rule that a waiver in one action extends to others is particularly harmful to tribes because it amounts to a unilateral waiver by the United States where the United States claims water rights as trustee on behalf of a tribe. Tribal land titles and perhaps other issues would automatically

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15/ In addition, the United States may claim water rights on behalf of other federal interests, including the Fish and Wildlife Service, the National Park Service, the Bureau of Reclamation, the Bureau of Land Management, and the Forest Service.

be subject to challenge without tribal consent. Such a rule would essentially discourage tribes from insisting that the United States perform its duty to represent them in the resolution of critical water rights issues. It would also lead to the curious result that tribes representing themselves would enjoy immunity in separate actions but tribes represented by the United States would not. This would be particularly awkward in cases where more than one tribe is participating in the same general stream adjudication; one tribe might have immunity from separate actions and others would not.

Finally, permitting judicial review in separate actions of issues raised in water rights adjudications would result in delay and uncertainty in the quantification of important treaty water rights--the very antithesis of this

Court's reasoning in Nevada v. United States, 463 U.S. 110 (1983) and Arizona v. California, 460 U.S. 605 (1983). This case is a prime example. The burden on judicial resources as well as on limited tribal and federal financial resources would be intolerable.

B. The McCarran Amendment Does Not Waive Immunity In This Action.

Petitioners argue that this action is a "partial stream adjudication" and therefore permitted under the McCarran Amendment, 43 U.S.C. §666. Pet. Br. at 45. However, this action is a suit over land title, not water rights. It is also a challenge to the authority of the Secretary of the Interior to correct erroneous reservation boundaries. But Petitioners do not and cannot seek to have their water rights adjudicated in this action, in part because it is not a

a comprehensive proceeding in which all the water users to the water source have been joined. See Dugan v. Rank, 372 U.S. 609 (1963).

Moreover, although the issues to which Petitioners seek resolution (the location of the boundaries and the title status of the lands) were raised in an action that might be a general stream adjudication, i.e., Arizona v. California, their proposition that the McCarran Amendment subjects the United States to suit on these related issues in a forum other than a court of competent jurisdiction over the general stream adjudication lacks authority and merit. A McCarran Amendment waiver extends only to general stream adjudications, not actions by individual water users. United States v. District Court for Eagle County, 401 U.S. 520 (1971). Moreover,

the McCarren Amendment was intended to avoid the very piecemeal adjudiciation of water rights issues that would result if separate actions on various issues were permitted. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). This Court has consistently honored the intent behind the McCarren Amendment and should do so in this case, especially where Petitioners have a forum, Arizona v. California, for resolution of the issues involved. To craft a rule otherwise would disrupt settled congressional policy, overturn major decisions of this Court, and potentially devastate tribal land holdings.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

Richard Dauphinais
Counsel of Record

Melody L. McCoy
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Amici Curiae

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